in the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73 556

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, 622, 759, 820 AND 1263,
Respondents,

and

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Florida Power & Light Company, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 29, 1973.[1]

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, pp. 3-75, is not yet officially reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board, printed in Appendix B hereto, *infra*, pp. 77-101, are reported 193 NLRB No. 7.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1973 (App. A, *infra*, pp. 1-2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board (hereafter, "Board") properly found that a union unlawfully restrains and coerces an employer in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances when it levies fines and imposes other sanctions against those representatives — Company supervisors — who were union members, who crossed union picket lines and performed Company work during a strike.

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[1]The Respondent Unions herein were Petitioners below, seeking to set aside a National Labor Relations Board order against them. Petitioner herein was Intervenor below, supporting the Board's cross-application for enforcement of its order, as Respondent below.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), (hereafter, "Act") are set out in Appendix C, *infra*, pp. 103-104.

STATEMENT

A. *The Board's Finding of Fact.*[2]

On October 22, 1969, eleven (11) Local Unions (R. 49)[1] representing Florida Power & Light Company's production and maintenance employees (R. 75-77) commenced an economic strike against the Company (R. 40). Picket lines were established and maintained at all, or substantially all, Company operational locations (R. 49). During the strike, which continued to December 29, 1969, supervisors who were members of the Respondent Unions, crossed the picket lines to perform work as required (R. 40; 48).

Following termination of the strike, five (5) of the Local Unions—Respondents here—notified the supervisors within their respective jurisdictions that charges had been filed against them for violations of the International Union's Constitution forbidding, generally, activity adverse to the Union's interests (R. 4; 50-53; 107). Fifty-four (54) (R. 14-17) supervisors were thereafter fined in amounts up to Six Thousand Dollars ($6,000.00) and/or expelled

[2]This matter was considered by the Board on a stipulation by the parties as to facts and issues, the parties waiving a hearing before a Trial Examiner.

[3]"R" refers to the record below, containing the Board's decision and order, the stipulation of the facts and issues by the parties below, and documentary exhibits.

from Union membership. Further, by the expulsions, those expelled lost their membership in a Union sponsored death benefit fund and their eligibility for Union pension benefits (App. B, p. 81, R. 56).

B. *The Board's Decision and Order.*

On the stipulated facts and issues, the Board concluded (Member Fanning dissenting) that Respondent Unions had restrained and coerced the Company in the selection of its representatives for collective bargaining and adjustment of grievances, in violation of Section 8(b)(1)(B) of the Act, by imposing fines and other sanctions on those supervisors who had crossed the picket lines and performed work, including bargaining unit work, for the Company during the strike.

The Board reasoned that "the fines struck at the loyalty an employer should be able to expect from its representatives for the adjustment of grievances"—its supervisors—"and therefore restrained and coerced employers in their selection of such representatives." The fact that the Company acquiesced in the retention of Union membership by the supervisors does not change the unlawful effect of the discipline. Nor does the fact that certain of the disciplined supervisors did not supervise bargaining unit employees alter the conclusion. According to the Board, the degree of coercion or restraint is no less because the disciplined supervisor has no "official role to play in the relations between the Union and the Employer." (R. 6).

The Board order (App. B, p. 86) required Respondent Unions to cease and desist from the conduct found unlawful and from in any like or related manner restrain-

ing or coercing the Company or any other employer in the selection of its collective bargaining or grievance adjustment representatives. Affirmatively, the Respondent Unions were ordered to rescind and expunge all records of, and refund the fines; to restore membership where cancelled and to take appropriate action to restore eligibility for all pre-discipline benefits.

C. *The Decision of the Court of Appeals.*

The instant case, *Florida Power & Light Company*, was consolidated with *International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO v. National Labor Relations Board (Illinois Bell Telephone Co.)* and reheard *en banc* "to resolve an important question of first impression arising under the National Labor Relations Act" (App. A, *infra*, p. 4).

That case (hereafter, *Illinois Bell*) was initially before the Court of Appeals for the District of Columbia on a petition by the Board to enforce its order against the Union on an unfair labor practice finding. The court, Judge Wright dissenting, enforced the Board's order, finding that discipline imposed on supervisors for crossing picket lines did restrain and coerce the Company in the selection of its representatives and detracted from the undivided loyalty owed by supervisors to the employer. The opinion of the three-judge panel (Judge Wright dissenting) is not published, but is included as Appendix F, *infra*, pp. 127-183.

Upon consolidation of *Illinois Bell* and the instant case, *Florida Power & Light Company*, and rehearing *en banc*,

the Court of Appeals denied enforcement of the Board's orders in both cases.[4]

The opinion of the court rejected the Board's conclusions in both cases and held that no violation exists unless the sanctions imposed upon supervisors were imposed as a result of the supervisor's activity as a Company representative for the purpose of collective bargaining or the adjustment of grievances.

The two-judge concurring opinion advances, primarily, the thesis that Congress gave the employer the option of refusing to hire union members as supervisors and never intended to allow supervisors to obtain advantages of union membership without assuming the obligations normally incident to such membership.

The four-judge dissent rejects the majority view that when a supervisor performs bargaining unit work during a strike, he is doing something unrelated to his supervisory function. Rather, they reason that a supervisor who performs bargaining unti work is furthering the employer's interest by enhancing its bargaining position during a strike.

Further, the dissent contends that the majority ignores the Board's argument that if a union can impose fines on supervisors who are acting in the employer's interest by performing struck work, such fines would drive a wedge between the supervisors and the employer, thus interfering with the loyalty and performance of the duties the employer

[4]The decision was by a divided court; three judges joined in the opinion of the court; two judges concurred with a separate opinion; four judges dissented.

has a right to expect from them. The Board has drawn a proper inference supported by substantial evidence that the discipline imposed upon the supervisors will interfere with the performance of their supervisory duties and, according to the dissent, this finding should be respected. Concluding, the four-judge dissent argues that the majority finds the determinative factor to be the type of work a supervisor performs during a strike. In terms of Congressional purpose underlying those sections of the Labor Management Relations Act treating with supervisors, the dissent finds this distinction makes no sense.

REASONS FOR GRANTING THE WRIT

1. The *en banc* decision of the court below in the instant case is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *National Labor Relations Board v. Local 2150, International Brotherhood of Electrical Workers, AFL-CIO*, ____ F.2d ____, (C.A. 7, 1973) #71-1864, decided August 13, 1973 (hereafter, *Wisconsin Electric)* (App. D, *infra*, pp. 105-117).[5] Further, *Wisconsin Electric* is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *National Labor Relations Board v. San Francisco Typographical Union No. 21, International Typographical Union, AFL-CIO*, ____ F.2d ____, (C.A. 9, 1973), Nos. 71-2949 and 71-2987, decided May 18, 1973 (hereafter, *Typographical Union)* (App. E, *infra*, pp. 119-122).

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[5]In footnote 7 (App. D, *infra*, p. 110) the court specifically rejected the majority holding in the *en banc Florida Power* opinion: "At the very least, insofar as it reaches an opposite conclusion on these facts, we disagree with the majority opinion therein and we are in accord with Judge MacKinnon's dissenting opinion . . ."

In *Wisconsin Electric*, the majority (Judge Kiley dissenting) accepted the Board's rationale that fines imposed on supervisors for crossing picket lines and performing bargaining unit work during a strike would, if let stand, "drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform" (App. D, *infra*, p. 108). The majority went on to reason that Section 8(b)(1)(B) of the Act could not properly be limited to union discipline of an employer representative based only on the representative's actions regarding the negotiation of a contract or the adjustment of a grievance, and stated:

> "Because they are supervisors, an employer has a right to expect that whether they are union members or not, they will discharge their properly supervisory or managerial responsibilities in the best interest of the company.
>
> * * *
>
> What a supervisor's proper functions are when the full complement of employees is at work under the regime of a collective bargaining agreement then in force is not determinative of supervisory responsibility during a strike."

Judge Kiley dissented "for the reasons . . . expressed by Judge Skelly Wright in *International Brotherhood of Electrical Workers, etc. et al. v. National Labor Relations Board*, Nos. 71-1559 (*Illinois Bell*) and 71-1712 (*Florida Power*)."

The question presented in *Typographical Union* was substantially identical to that presented in *Florida Power* (consolidated with *Illinois Bell*), and in *Wisconsin Electric*. Thus, during an economic strike, certain union member supervisors performed Company work during a strike. Upon charges by the Union, they were fined for their activity. The Court of Appeals for the Ninth Circuit declined to enforce the Board's order, concluding that as union members, the supervisors were subject to union discipline. Citing *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), the court reasoned that to find a violation of Section 8(b)(1)(B) in the circumstances of the case would improperly weaken the union in use of its "ultimate weapon," an economic strike (App. E, *infra*, p. 121).

We submit that the courts of appeals are in substantial disagreement as to the proper scope and application of the restriction contained in Section 8(b)(1)(B) of the Act. Further, as to the Court of Appeals for the District of Columbia and the Court of Appeals for the Seventh Circuit, there are irreconcilable differences between members of the respective courts as to the proper interpretation of that Section. We feel there is a strong probability that the Board, in its experience and expertise, has advanced the proper scope of Section 8(b)(1)(B) of the Act. Were it otherwise, a union when exercising its "ultimate weapon," could subvert the loyalty a Company is entitled to expect from its supervisors and with impunity engage in "interference with the employer's right to control its own representatives." [*NLRB v. Toledo Locals Nos. 15-P and 272, Lithographers & Photoengravers Int. Union*, 437 F.2d 55 at 57 (C.A. 6, 1971).]

2. The Board, in its developing experience and expertise, has concluded that Section 8(b)(1)(B) of the Act forbids a union from imposing sanctions against a union member supervisor for acting in the legitimate business interests of his employer during a strike. This conclusion, and the conclusion in the instant case, has developed from, and is supported by, a uniform series of Board decisions. *San Francisco-Oakland Mailers Union No. 18*, 172 NLRB No. 252 (1968); *Dallas Mailers Union, Local 143*, 181 NLRB 286 (1970), enf'd. 445 F.2d 730 (C.A.D.C., 1970); *New Mexico District Council of Carpenters and Joiners of America (A. S. Horner, Inc.)*, 176 NLRB 797 (1969) and 177 NLRB 500 (1969), enf'd. sub nom., *NLRB v. New Mexico District Council of Carpenters and Joiners*, 454 F.2d 1116 (C.A. 10, 1972); *Toledo Locals Nos. 15-P and 272, Lithographers & Photoengravers International Union, AFL-CIO (Toledo Blade)*, 175 NLRB 1072 (1971), enf'd. 437 F.2d 55 (C.A. 6, 1971); *Sheet Metal Workers International Association, Local Union 49, AFL-CIO*, 178 NLRB No. 24 (1969), enf'd. 430 F.2d 1348 (C.A. 10, 1970); *Houston Typographical Union No. 87*, 182 NLRB 592 (1970); *Meat Cutters Local 81, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO*, 185 NLRB 884 (1970), enf'd. 458 F.2d 794 (C.A.D.C., 1972).

We submit that unless the conflict now existing between the Circuit Courts of Appeals, and between the Board and District of Columbia Circuit and Ninth Circuit, is resolved by this Court, this very important area of labor law will become a morass of uncertainty and continuing conflict as to legal rights throughout the country. Review is therefore warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

RAY C. MULLER

Attorney for Petitioner

August, 1973.

APPENDIX INDEX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT
September Term, 1972

No. 71-1559
International Brotherhood of Electrical Workers AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO,

Petitioners

v.

National Labor Relations Board

No. 71-1712
International Brotherhood of Electrical Workers, Locals 641, 622, 759, 820, and 1263,

Petitioners

v.

National Labor Relations Board,

Respondent

Florida Power and Light Company,

Intervenor

PETITIONS TO REVIEW
AND CROSS-APPLICATIONS FOR ENFORCEMENT
OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD

Before: Bazelon, Chief Judge, and Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges, sitting en banc

[Filed June 29, 1973]

JUDGMENT

These causes came on to be heard by the Court en banc and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by the Court en banc, that the orders of the National Labor Relations Board on review herein are reversed and these cases remanded for the reasons set forth in the opinions filed this date.

Per Curiam

Date: June 29, 1973

Opinion of the Court, concurred in by Chief Judge Bazelon and Circuit Judges McGowan, Leventhal and Robinson filed by Circuit Judge Wright.

Concurring opinion in which Circuit Judge McGowan joins, filed by Circuit Judge Leventhal.

Dissenting opinion concurred in by Circuit Judges Tamm, Robb, and Wilkey filed by Circuit Judge MacKinnon.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1559

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 71-1712

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCALS 641, 622, 759, 820, AND 1263, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

FLORIDA POWER & LIGHT COMPANY, INTERVENOR

Petitions to Review and Cross-Applications to Enforce Orders of the National Labor Relations Board

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On Rehearing *En Banc*

Decided June 29, 1973

Laurence J. Cohen for petitioners in No. 71-1559.

Seymour A. Gopman for petitioners in No. 71-1712.

Daniel M. Katz, Attorney, National Labor Relations Board, with whom *Marcel Mallet-Prevost*, Assistant General Counsel, and *Warren M. Davison*, Deputy Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Ray C. Muller for intervenor in No. 71-1712.

Before BAZELON, *Chief Judge*, and WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*, sitting *en banc*.

Opinion for the court, concurred in by *Chief Judge* BAZELON and *Circuit Judges* MCGOWAN, LEVENTHAL and ROBINSON, filed by *Circuit Judge* WRIGHT, at p. 2.

Concurring opinion, in which *Circuit Judge* MCGOWAN joins, filed by *Circuit Judge* LEVENTHAL, at p. 50.

Dissenting opinion, concurred in by *Circuit Judges* TAMM, ROBB and WILKEY, filed by *Circuit Judge* MACKINNON, at p. 55.

WRIGHT, *Circuit Judge*: These cases were consolidated and heard *en banc* to resolve an important question of first impression arising under the National Labor Relations Act: Does a union commit an unfair labor practice under Section 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B) (1970), by disciplining supervisor-members for crossing a picket line and performing rank-and-file struck work during a lawful economic strike against the company? The National Labor Relations Board answered the question in the affirmative and issued cease and desist and other orders against the unions involved.[1] We reverse, deny en-

[1] *See Int. Brhd of Electrical Wkrs System Council U-4*, 193 NLRB No. 7 (1971); *Int. Brhd of Electrical Wkrs*, 192 NLRB No. 17 (1971).

forcement of the Board's orders, and remand both cases to the Board with instructions to dismiss the complaints.

Although the issue, as stated above, is a legal question of statutory construction, we think it helpful to have a full understanding of the factual context in which the issue arose in the two cases before us.

Florida Power & Light Co., No. 71-1712

The Florida Power & Light Company has, since 1953, maintained a collective bargaining agreement with the International Brotherhood of Electrical Workers, AFL-CIO, through the union's System Council U-4 comprising the local unions involved in this case.[2] There was no provision in the collective bargaining agreement requiring employees to become members of the union as a condition of employment, and union membership was accordingly voluntary. Section 14(a) of the Act, 29 U.S.C. § 164(a) (1970),[3] provides that an employer shall not be compelled to deem supervisors as employees for the purpose of collective bargaining. In addition, Section 2(3)[4] exempts supervisors, as

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[2] System Council U-4 in fact comprises 12 local unions, only 5 of which are involved in the present controversy. The Board entered its order only against the locals involved, not against the Council.

[3] "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

[4] 29 U.S.C. § 152(3) (1970):

"The term 'employee' * * * shall not include any individual employed as * * * a supervisor * * *."

defined in Section 2(11),[5] from the definition of "employee" in the Act, thereby depriving supervisors of the protections of the Act and permitting an employer to refuse to hire union members as supervisors [6] and to refuse to engage in collective bargaining with its supervisors.[7] Florida Power chose not to exercise its rights under these sections and recognized the union as the exclusive bargaining representative for many of its supervisory employees. They were considered part of the bargaining unit and their wages and conditions of employment were set out in the bargaining agreement.

Other higher ranking supervisors were not represented by the union for collective bargaining purposes and did not have their wages and conditions of employment determined by the collective bargaining agreement. These included supervisors in the positions of District Supervisor,

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[5] 29 U.S.C. § 152(11):

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[6] *See Carpenters District Council of Milwaukee County* v. *NLRB*, 107 U.S.App.D.C. 55, 57, 274 F.2d 564, 566 (1959); *A. H. Bull Steamship Co.* v. *National Marine Engineers' Beneficial Assn*, 2 Cir., 250 F.2d 332, 339 (1957); *NLRB* v. *Edward G. Budd Mfg Co.*, 6 Cir., 169 F.2d 571, 579 (1948), *cert. denied*, 335 U.S. 908 (1949).

[7] *See L. A. Young Spring & Wire Corp.* v. *NLRB*, 82 U.S. App.D.C. 327, 163 F.2d 905 (1947), *cert. denied*, 333 U.S. 837 (1948).

Assistant District Supervisor, Assistant Supervisor, Plant Superintendent, Plant Supervisor, Assistant Plant Superintendent, Distribution Assistant, Results Assistant, Assistant Plant Engineer, Substation Supervisor, and some miscellaneous supervisory classifications. The company, however, also permitted these higher ranking supervisors, many of whom had attained high ranking supervisory status after passing through the rank and file and through lower bargaining unit supervisory classifications, to maintain their union membership. It is with these high ranking supervisors who, though union members, were not represented by the union for collective bargaining purposes that the present case is concerned.[8]

Although their wages and conditions of employment were not negotiated for them by the union, these supervisors nevertheless received substantial benefits from union membership. In particular, union membership in good standing gave them the right to participate in the System Council Death Benefit Fund[9] and made them eligible for

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[8] The union also disciplined bargaining unit supervisors for crossing the picket line and performing rank-and-file struck work. The Board, however, did not attempt to base its unfair labor practice finding on union discipline of these members, expressly excluding this aspect of the case by stipulation. *See* Joint Appendix at 57. We might note, however, that under the Board's approach § 8(b)(1)(B) would bar union discipline of supervisor-members whose wages and conditions of employment are covered by the collective bargaining agreement. *See generally* pp. 45-46 *infra*.

[9] Under the terms of the Fund's by-laws, upon the death of any member the deceased's beneficiary would receive benefits equal to one dollar times the number of members of the Fund in good standing during the month prior to the member's death. Money with which to pay the benefits was obtained by assessing each member one dollar upon the death of any other member.

pension, disability, and death benefits under the terms of the International's constitution.[10]

A small number of the supervisors involved in this case were union members who paid no dues because they had obtained withdrawal cards from the union. Some had apparently obtained "honorary" withdrawal cards, under the terms of which the member did not actively participate in the union and did not pay monthly dues. The card constitutes a valuable benefit, however, as it permits the holder, in the event he loses his supervisory position and returns to the rank and file, to return to active membership without paying the initiation fee normally required of new members, simply by returning the withdrawal card and resuming payment of dues. It was the practice of the System Council Death Benefit Fund to permit supervisors who had obtained honorary withdrawal cards to continue their participation in the Fund. Other supervisors had apparently obtained "participating" withdrawal cards. Under the International constitution, these members could not actively participate in the union, but continued to pay a monthly fee equal to normal monthly dues, and therefore continued to remain eligible for pension, death, and disability benefits.[11]

All union members, including those on withdrawal cards,[12] bore certain obligations under the union's constitu-

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[10] These benefits were funded from the monthly dues required of every member.

[11] *See* note 10 *supra*.

[12] Art. XXVI, § 5 of the International Constitution provides:

> "The validity of any withdrawal card shall be dependent upon the good conduct of the member. * * *
>
> "A member on a withdrawal card may be subject to charges, trial and appropriate penalty in accordance with provisions of this Constitution."

tion, which provides that "[a]ny member may be penalized for committing any one or more" of 23 listed offenses. The offenses most relevant to the present case are "(10) Working in the interest of any organization or cause which is detrimental to, or opposed to, the I.B.E.W." and "(21) Working for any individual or company declared in difficulty with a [local union] or the I.B.E.W., in accordance with this Constitution." In the collective bargaining agreement, however, the union made certain concessions with respect to union discipline of supervisor-members. The contract provides:

> "• • • It is further agreed that employees in [supervisory] classifications have definite management responsibilities and are the direct representatives of the Company at their level of work. Employees in these classifications and any others in a supervisory capacity are not to be jacked up or disciplined through Union machinery for the acts they may have performed as supervisors in the Company's interest. The Union and the Company do not expect or intend for Union members to interfere with the proper and legitimate performance of the Foreman's management responsibilities appropriate to their classification. • • •"

From October 22, 1969 through December 28, 1969, the union was engaged in an economic strike against the company, and the local unions maintained picket lines at nearly all of the company's operational facilities. Many supervisor-members crossed the picket lines and performed rank-and-file struck work—that is, work normally performed by nonsupervisory employees when no strike is in progress.[13] Whether they crossed the picket line at the request of the company or totally of their own volition is not revealed in the record. The union brought charges for

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[13] It is conceded that the union did not fine those supervisors, if any, who crossed the picket line solely to perform their usual supervisory functions.

violations of the union's constitution, and those found guilty of crossing the picket line to perform rank-and-file struck work received fines of from $100 to $6,000. Most were also expelled from the union, thereby losing their right to continue participating in the System Council Death Benefit Fund. By expulsion they were also deprived of the membership in good standing which was a prerequisite for receiving pension, disability, or death benefits under the International constitution.[14]

The Board found that in so disciplining supervisor-members the union violated Section 8(b)(1)(B) because the fines "struck at the loyalty an employer should be able to expect from its representatives for the adjustment of grievances and therefore restrained and coerced employers in their selection of such representatives." *Int. Brhd of Electricol Wkrs System Council U-4,* 193 NLRB No. 7 (slip opinion at 6) (1971). Accordingly, the Board ordered the union to cease and desist, rescind all fines, expunge all records of disciplinary proceedings, restore union membership, restore eligibility in all benefit plans, and post appropriate notices.

Illinois Bell Telephone Co., No. 71-1559

The Illinois Bell Telephone Company and its predecessors have, since 1909, maintained a contractual relationship with Local 134, International Brotherhood of Electrical Workers, AFL-CIO. Illinois Bell, like Florida Power, chose not to exercise its right under Sections 2(3), 2(11), and 14(a) of the Act to refuse to hire union members as

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[14] We intimate no views concerning the reasonableness of the fines or expulsions. Such matters are not within the Board's jurisdiction under § 8(b)(1) but rather may be litigated in appropriate state court proceedings. *See generally NLRB* v. *Boeing Co.*, —— U.S. ——, 41 U.S. L. WEEK 4678 (May 21, 1973).

supervisors. The union was recognized as the exclusive bargaining representative, not only for rank-and-file journeymen and apprentice employees, but also for employees within certain supervisory categories, including General Foreman, P.B.X. Installation Foreman, and Building Cable Foreman. These supervisors, as well as rank-and-file members of the bargaining unit, were required to become and remain members of Local 134 under the terms of a union security clause agreed to by the company in the collective bargaining agreement.

As recently as 1959, the collective bargaining agreements had prescribed monthly wage rates applicable to these foremen. Contracts since then have not contained such wage provisions, but the bargaining agreement in effect at the time of the instant dispute included a section entitled "Working Conditions for General Foremen and Foremen," which concerned payment for overtime work and for certain absences. Other provisions of the agreement, for example that dealing with vacations, were found by the trial examiner to be applicable to foremen as well as to rank-and-file employees.[15]

Other higher ranking supervisors were not part of the bargaining unit and were not represented by the union for collective bargaining purposes. None of their conditions of employment were determined by the bargaining agreement. These included employees in the positions of District Installation Superintendent, Plant Assignment Foreman, and Test Center Foreman. The company also permitted these higher ranking supervisors to maintain their union membership. In fact, in 1954, when the position of District Installation Superintendent was first created, the

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[15] *Int. Brhd of Electrical Wkrs, supra* note 1, 192 NLRB No. 17 (trial examiner's decision at 3).

company and the union signed a Letter of Understanding, apparently still in force, providing that

> "[a]s District Installation Superintendents * * * their wages and conditions of employment will not be a matter of union-management negotiations but They [*sic*] will not be required to discontinue their membership in the union as it is recognized that they have accumulated a vested interest in pension and insurance benefits as a result of their membership in the union. * * *"

In contrast to *Florida Power*, we are here concerned with supervisors both in and out of the bargaining unit.

All supervisor-members received substantial benefits from union membership. Those in the bargaining unit benefitted in having the union act as their representative for collective bargaining purposes, including the benefit of any contract provisions obtained on their behalf by the union. Those both in and out of the bargaining unit benefitted from participation in the International's pension benefit and death benefit plans and from participation in group life insurance and old age benefit plans sponsored by Local 134. As in *Florida Power*, some supervisor-members apparently were no longer active dues-paying members but had obtained withdrawal cards. But, as indicated earlier, those on withdrawal cards continued to benefit under certain of the benefit plans.

The same International union is involved in both cases, and union members of Illinois Bell bore the same obligations under the International's constitution as were described earlier. In contrast to the *Florida Power* case, however, there was no provision in the Illinois Bell collective bargaining agreement in which the union purported to make any concessions with respect to union discipline of supervisor-members. The only related provision is in the 1954 Letter of Understanding which, after recognizing

that those serving as District Installation Superintendents will be permitted to continue union membership, provides:

> "However, any allegiance they owe to the union shall not affect their judgment in the disposition of their supervisory duties. Since they will have under their supervision employees who are members of unions other than Local 134 and perhaps some with no union affiliations whatever, the company will expect the same impartial judgment that it demands from all Supervisory personnel."

Between May 8, 1968 and September 20, 1968, Local 134 engaged in an economic strike against the company. At the inception of the strike, the company informed supervisory personnel that it would like to have them come to work during the work stoppage, but it told them the decision whether to work or to respect the strike was a matter left to the personal discretion of each individual. Indeed, the employer indicated that those who chose not to work would not be penalized. In contrast, Local 134 warned its supervisor-members, at a union meeting held immediately before the strike, that they would be subject to union discipline if they performed rank-and-file work during the strike. During the course of the strike, some of the supervisor-members crossed the union's picket line to perform rank-and-file struck work, while other supervisors honored the strike and stayed away from work. Local 134 carried out its pre-strike warning and brought disciplinary actions against a number of supervisors. Those who were found guilty of performing rank-and-file work during the strike were each fined $500. Unlike *Florida Power*, apparently no supervisors were expelled from the union or denied the right to continue participating in various union benefit plans. Local 134 has commenced suit in the Illinois courts to collect some of the fines, but insofar as any supervisors have paid any part of the fines the company has reimbursed them.

The Board found that in so disciplining supervisor-members the union violated Section 8(b)(1)(B) because "the underlying dispute giving rise to the fines was between the Union and Illinois Bell rather than between the Union and its supervisor-members." *Int. Brhd of Electrical Wkrs,* 192 NLRB No. 17 (slip opinion at 7) (1971). The Board referred to its decision in a case consolidated with *Illinois Bell* for purposes of oral argument before the Board in which it had said:

> "• • • The intent [of Section 8(b)(1)(B)] is to prevent the supervisor from being placed in a position where he must decide either to support his employer and thereby risk internal union discipline or support the union and thereby jeopardize his position with the employer. To place the supervisor in such a position casts doubt both upon his loyalty to his employer and upon his effectiveness as the employer's collective-bargaining and grievance adjustment representative. The purpose of Section 8(b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer. • • •"

Local Union No. 2150, Int. Brhd of Electrical Wkrs, 192 NLRB No. 16 (slip opinion at 7) (1971). Accordingly, the Board ordered the union to cease and desist, rescind all fines, expunge all records of disciplinary proceedings, and post appropriate notices.

I

Section 8(b)(1)(B) provides: "It shall be an unfair labor practice for a labor organization or its agents • • • to restrain or coerce • • • *an employer* in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances • • •." (Emphasis

added.) The purpose of this provision is clear on its face. It is designed to prevent unions from restricting management's free choice of its agent to bargain with the union or adjust grievances. Under the Act, each party to the collective bargaining process has a right to choose its representative, and there is a correlative duty on the opposite party to negotiate with the appointed agent. *See NLRB* v. *Int. Ladies' Garment Wkrs Union*, 3 Cir., 274 F.2d 376 (1960).

The legislative history of the section is fully consistent with this literal reading. The Senate Report says that the section

> "proscribes unions and their agents from interfering with, restraining, or coercing employers in the selection of their representatives for the purposes of collective bargaining or the settlement of grievances. • • • [T]his subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances."

1 Legislative History of the Labor Management Relations Act (hereinafter "Legis. Hist.") 427 (1948). Senator Taft gave an appropriate example of the kind of activity the section was designed to proscribe:

> "This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.' • • •"

2 Legis. Hist. 1012. Senator Ellender echoed the same concerns:

> "• • • [Q]uite a few unions forced employers to change foremen. They have been taking it upon them-

selves to say that management should not appoint any representative who is too strict with the membership of the union. This amendment seeks to prescribe a remedy in order to prevent such interferences."

Another concern expressed in the legislative history involves unions forcing management to bargain through a multi-employer association.

> "* * * [A] union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members * * *."

1 Legis. Hist. 427.

> "* * * Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' * * *"

2 Legis. Hist. 1012 (remarks of Senator Taft).

For over 20 years since its enactment in 1947, Section 8(b)(1)(B) interpretations by the Board faithfully followed its literal language and this legislative history. The cases decided by the Board involved attempts either to force employers into or out of multi-employer associations, *see, e.g., United Slate, Tile, etc. Wkrs Assn, Local 36 (Roofing Contractors Assn of Southern California)*, 172 NLRB No. 249 (1968); *Orange Belt District Council of Painters No. 48 (Painting & Decorating Contractors of America, Inc.)*, 152 NLRB 1136 (1965), or to force dismissal of an employer bargaining representative or grievance adjuster considered objectionable because of his tough, anti-union attitude, *see, e.g., Local 986, Teamsters Union (Tak-Trak, Inc.)*, 145 NLRB 1511 (1964); *Los An-*

geles Cloak Joint Board, ILGWU (Helen Rose Co.), 127 NLRB 1543 (1960). *See also NLRB v. Local 294, Int. Brhd of Teamsters*, 2 Cir., 284 F.2d 893 (1960).

That the present cases lie outside this original understanding of Section 8(b)(1)(B) seems obvious. There was no claim or showing in either case that the purpose of disciplining the supervisors was to get management to replace them. There is no indication that replacement of the fined supervisors was even a likely result of the union discipline. Indeed, just the opposite seems the case. In *Illinois Bell*, at the inception of the strike management expressly told all supervisors that no reprisals would be taken against those observing the picket line, and after the strike management promoted many of those who chose not to cross the picket line to perform rank-and-file work. Nor is there any indication in *Florida Power* that the company replaced any striking supervisors. The only purpose and likely effect of the imposition of union discipline was to force the supervisors to observe the picket line to the extent of not performing struck work for the employer. If anyone was restrained or coerced, it was the supervisors, not their employer.

Since 1968, however, the Board has embarked upon a new approach in applying Section 8(b)(1)(B), expanding its scope far beyond the situations encompassed in this original understanding. The process began with the Board's decision in *San Francisco-Oakland Mailers' Union No. 18*, 172 NLRB No. 252 (1968). In *Oakland Mailers*, management charged the union with attempting to discipline a foreman for the manner in which he interpreted the collective bargaining contract in making work assignments for the employees under his supervision. Although there was no allegation that the union was attempting to coerce the employer into hiring a new representative for collective bargaining and adjustment of grievances, the Board

nonetheless found a Section 8(b)(1)(B) violation. The union's actions, according to the Board, "were designed to change the [company's] representatives from persons representing the viewpoint of management to persons responsive or subservient to [the union's] will." Slip opinion at 2. This was the sort of pressure which Section 8(b)(1)(B) was designed to prevent. "That [the union] may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the [company] by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [company's] control over its representatives. Realistically, the [company] would have to replace its foremen or face *de facto* nonrepresentation by them." *Id.* at 3.

Although the *Oakland Mailers* doctrine unquestionably expanded Section 8(b)(1)(B) to cover situations not envisioned by the section's enactors, we have recognized and continue to recognize that its basic rationale is consistent with the purposes of Section 8(b)(1)(B). *See Dallas Mailers Union, Local No. 143* v. *NLRB*, 144 U.S.App.D.C. 254, 445 F.2d 730 (1971). Where a supervisor is disciplined for the manner in which he performed his collective bargaining and grievance adjustment functions, the union's purpose in imposing such discipline and the discipline's likely effect is to change the manner in which the supervisor performs those functions in the future. Discipline therefore achieves by indirect means what Section 8(b)(1)(B) clearly was intended to prevent. It permits the union to get a supervisor who is not "too strict with the membership of the union," *see* page 14 *supra*, not by changing the identity of the supervisor, but by changing the attitude the supervisor brings to his grievance adjustment and collective bargaining tasks. Although Section 8(b)(1)(B) speaks literally in terms of coercing the "selection" of employer representatives, it is clear that management's right to a

free selection would be hollow indeed if the union could dictate the manner in which the selected representative performed his collective bargaining and grievance adjustment duties.

In several cases decided after *Oakland Mailers*, the Board continued to apply Section 8(b)(1)(B) to union attempts to discipline supervisors for the manner in which they performed their collective bargaining or grievance adjustment functions. In some of these cases fines had been imposed "for the manner in which the [foreman] had interpreted and administered" the collective bargaining agreement, *Toledo Locals Nos. 15-P & 272. Lithographers & Photoengravers Int. Union (Toledo Blade Co.)*, 175 NLRB 1072 (1969), *enforced*, 6 Cir., 437 F.2d 55 (1971), or where the union had "sought, by an internal union procedure, to enforce its viewpoint as to the meaning of the contract," *Sheet Metal Wkrs Int. Assn, Local Union 49 (General Metal Products, Inc.)*, 178 NLRB 139, 142 (1969), *enforced*, 10 Cir., 430 F.2d 1348 (1970). *See also Houston Typographical Union No. 87*, 182 NLRB 592 (1970);[16] *Freight, Constr., Gen. Drivers, Warehousemen & Helpers Union (Grinnell Co. of the Pacific)*, 183 NLRB No. 49 (1970);[17] *New Mexico District Council of Carpenters & Joiners (A. S. Horner, Inc.)*, 176 NLRB 797 (1969), *enforced*, 10 Cir., 454 F.2d 1116 (1972).[18] In another case a

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[16] "[T]he instant case involves discipline of a supervisor-member * * * for violation of the contract * * *." 182 NLRB at 595 (trial examiner's decision).

[17] Here the underlying contract dispute between the union and the supervisor-member was whether certain work fell within the supervisor's job classification under the contract or within other employees' job classifications. 183 NLRB No. 49 (trial examiner's decision at 4 & 9).

[18] In this case the union disciplined a supervisor-member who co-signed a letter urging employees to vote with man-

foreman was fined for being too strict with one of the employees under his supervision, and the record clearly indicated that the union desired to have the foreman replaced. *See Dallas Mailers Union, Local No. 143* v. *NLRB, supra, enforcing* 181 NLRB 286 (1970).

A common theme emerges from these cases which at once defines the scope of the *Oakland Mailers* doctrine and relates that doctrine to the core concerns of Section 8(b)(1)(B). In each, "[t]he relationship between the Union and its members * * * [was] used as a convenient and, it would seem, powerful tool * * * to compel the Employer's foremen to take pro-union positions in interpreting the collective bargaining agreement." *San Francisco-Oakland Mailers' Union No. 18, supra,* 172 NLRB No. 252 (slip opinion at 4).[19]

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agement in an upcoming election. Obviously, it is part of a supervisor's collective bargaining duties to urge management's viewpoint on union members. The union thus disciplined the supervisor for the effective performance of his collective bargaining function, bringing the case squarely within the *Oakland Mailers* rationale.

[19] "There have been several cases dealing with the question whether the imposition by a union of a fine on an employer representative authorized to adjust grievances violates Section 8(b)(1)(B). In all these cases the Board found a violation. However, * * * they involved fines imposed on a supervisor because of his alleged violation of a collective bargaining contract, and the Board's rationale in those cases * * * was that the respondent union's action was designed to compel the supervisor 'to take pro-union positions in interpreting the collective-bargaining agreement.' It is apparent from this that the Board was influenced in those cases by the fact that the supervisor was disciplined for an alleged misinterpretation or misapplication of the contract, and that the natural and foreseeable effect of such discipline was that, in resolving future grievances over alleged contract

The cases before us, however, are critically different from those decided under *Oakland Mailers* and lie outside the rationale of that case and its progeny. In both cases here the union has disciplined supervisors, not for the way they interpreted the collective bargaining agreement, not for being too strict with union members, but simply for crossing a picket line to perform rank-and-file struck work. There is no underlying dispute relating to contract interpretation or grievance settlement in these cases, but rather an economic clash between union and employer totally unrelated to the manner in which supervisors perform their collective bargaining or grievance settlement functions. As the trial examiner in *Illinois Bell* pointed out, the previous cases are all

> "readily distinguishable here where the action for which the supervisors were fined bore no direct rela-

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violations, the supervisor would be reluctant to take a position adverse to that of the union * * *. * * *"

Local Union No. 453, Brhd of Painters, etc. (Syd Gough & Sons, Inc.), 183 NLRB No. 24 (1970) (trial examiner's decision at 3) (footnotes omitted).

Only one previously decided § 8(b)(1)(B) opinion cannot be squared with this rationale, but it is explainable on other grounds. In *New Mexico District Council of Carpenters & Joiners of America (A. S. Horner, Inc.)*, 177 NLRB 500 (1969), *enforced*, 10 Cir., 454 F.2d 1116 (1972), a union member was fined for working as a supervisor for a company which had no contract with the union. In these circumstances, however, compliance by the supervisor with the union's demands would have meant quitting his job with the employer, thereby having "the effect of depriving the Company of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievances." 177 NLRB at 502. The case thus falls close to the original rationale of § 8(b)(1)(B) which was to permit the employer to keep the bargaining representative of his own choosing. *See* text at pp. 14-15, *supra*. *See also Local Union No. 453, supra*, 183 NLRB No. 24 (trial examiner's decision at 4).

tion to their work as supervisors or to any interpretation of the contract. As an original proposition I would be inclined to construe Section 8(b)(1)(B) as interdicting union fines of supervisors only when the conduct for which the supervisor was fined bore some relation to his role as a representative of management in 'collective bargaining or the adjustment of grievances,' to quote Section 8(b)(1)(B). In the instant case the question confronting the supervisors whether to work or to respect the strike call of their Union was in no way related to those subjects. Moreover, the Company itself had made it clear that it was not demanding that its supervisors work during the strike. On the contrary, the Company expressly left the decision up to each individual supervisor, with specific assurances that no reprisal would be visited on those who chose not to work. After the strike the Company promoted some of the supervisors who had not worked during the strike. I therefore find some difficulty in concluding that the Company was restrained or coerced by the Union's action in fining the supervisors who worked, or even in finding that the Union's action had any natural or inherent tendency to restrain or coerce the Company. * * *"

192 NLRB No. 17 (trial examiner's decision at 9). And as Member Fanning pointed out in dissent:

"Here the supervisors were not fined because they gave directions to the work force, interpreted the collective-bargaining agreement, adjusted grievances, or performed any other function generally related to supervisory activities, in a manner in disfavor with the Respondent Union. They were fined because they performed production work in the bargaining unit during a strike. Their Employer sought to use them, not in the direction of the work of employees who had not gone on strike or of replacements for strikers, but to replace the strikers themselves. In short, he assigned them to work as employees within the meaning of Section 2(3) of the Act, not as supervisors within the meaning of Section 2(11) of the Act. * * *"

192 NLRB No. 17 (slip opinion at 13).

The Board insists, however, that the present cases fall within the *Oakland Mailers* rationale. Its position is couched in vague but superficially appealing language. It is said that these fines "impinged on the loyalty" which the employer should be able to expect from his supervisors, *id.* at 6, that if they were found to be lawful they would permit the union "to drive a wedge between a supervisor and the Employer," *Local Union No. 2150, Int. Brhd of Electrical Wkrs, supra,* 192 NLRB No. 16 (slip opinion at 6), and that as a result an employer "could no longer count on the complete and undivided loyalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances." *Id.* at 6-7. If we try to rephrase the Board's language in terms consistent with the rationale of *Oakland Mailers,* the Board's position seems to come down to the following propositions. By being forced to take sides with the union during any confrontation between union and employer, even one unrelated to performance of his collective bargaining or grievance adjustment functions, a supervisor becomes, or is likely to become, more loyal to the union and less loyal to the company. He is then likely to bring this shift in loyalties to his grievance adjustment or collective bargaining tasks in the future, thus achieving in the end precisely that which Section 8(b)(1)(B) and the *Oakland Mailers* doctrine were intended to prevent. In our view, the Board overestimates the risk that discipline for performing rank-and-file struck work will significantly affect performance of grievance adjustment and collective bargaining functions.

Discipline, or the threat thereof, may well force a supervisor to observe a picket line, but it is questionable whether it will turn him into a believer in the union's cause. The Illinois Bell Company apparently recognized as much when it promoted many of those supervisors who, under threat of union discipline, refused to cross the

picket line to perform rank-and-file struck work. Our everyday experience tells us that the result of discipline is normally some degree of hostility toward the person or group imposing the discipline, and this commonsense analysis appears confirmed by the record in the cases before us. The result of threatened union discipline was to turn the supervisors against the union, not to ingratiate them into the union fold. This is even clearer when we look at expulsion as a disciplinary measure. Those who are expelled are obviously going to be more loyal to the company and less loyal to the union in the future. One who has resigned or been expelled from union membership owes no further obligations to the union. *See NLRB* v. *Granite State Joint Board, Textile Wkrs Union of America, Local 1029,* 409 U.S. 213 (1972). Therefore, not only is there no reason to conclude that those supervisors of Florida Power who were expelled from the union will be more lenient with the union when they are called upon to interpret the contract, adjust grievances, or engage in collective bargaining in the future. Just the opposite is likely to be the case.

More importantly, let us concede for the moment that in some manner, perhaps through the camaraderie of the picket line, a supervisor who is forced under threat of discipline to observe a picket line undergoes a subtle change in attitude and comes to feel closer ties to the union. It still does not follow that this change in attitude will affect his performance of his collective bargaining or grievance adjustment functions. When a supervisor acts as such he is a representative of management, and as such he should be immune from union discipline. The unions participating in the present cases conceded as much as oral argument when they agreed that when a supervisor crosses a picket line to perform *supervisory* work he remains immune from discipline. But when a supervisor forsakes his supervisory role to do rank-and-file work ordinarily the

domain of nonsupervisory employees, he is no longer acting as a management representative and no longer merits any immunity from discipline. The dividing line between supervisory and nonsupervisory work in the present context is sharply defined and easily understood. There is accordingly no reason to believe that by being forced to take sides with the union in a dispute unrelated to the performance of his supervisory functions, and to take sides only to the extent of withholding his labor from rank-and-file nonsupervisory work, a supervisor will suffer from a change in attitude when, after the strike, he returns to the performance of his normal supervisory duties. Despite the Board's protestations to the contrary, he is not put in the difficult position of serving the union and the employer at the same time. As the Board has noted in an analogous situation where supervisory and rank-and-file functions were "sharply demarcated," the supervisors "will not be 'serving two masters at the same time.' They will be serving them at different times." *See Great Western Sugar Co.*, 137 NLRB 551, 553-554 (1962).

The foregoing analysis should serve to dispel any support the Board might have hoped to obtain from our recent decision in *Meat Cutters Union Local 81* v. *NLRB*, 147 U.S.App.D.C. 375, 458 F.2d 794 (1972). In its decision in this case, *Meat Cutters Union Local 81*, 185 NLRB No. 130 (1970), the Board found a Section 8(b)(1)(B) violation when a union attempted to discipline a supervisory employee for obeying a company order to institute a new meat procurement policy which would have resulted in a loss of union jobs. *Meat Cutters* differed from *Oakland Mailers* in that no one claimed that the new procurement policy had anything to do with the supervisor's grievance settlement or collective bargaining functions. It was thus unclear how the Board could claim that any substitution of attitudes or shift in loyalties in violation of Section 8(b)(1)(B) as to these functions had occurred, particu-

larly in view of its recent explicit rejection of a *per se* ban on all union discipline of supervisory employees. *See Local Union 453 Brhd of Painters, etc. (Syd Gough & Sons, Inc.)*, 183 NLRB No. 24 (1970).

When *Meat Cutters* was appealed to this court, we were clearly concerned that the Board's Section S(b)(1)(B) decisions might be deteriorating into a flat prohibition against any union discipline of supervisors. Our objections to such a prohibition are explained in greater detail in Part III of this opinion, but suffice it for now to state that such an approach inequitably gives supervisory personnel all the benefits of union membership without having to bear any of the responsibilities. In its brief in *Meat Cutters*, however, the Board sought to meet these fears and dispel them. "[I]t is only when the representative's obligations to the union conflict with his management responsibilities that his union obligations are compelled to yield," the Board argued. "Thus, in each case, including the instant case, where the Board has found a Section 8(b)(1)(B) violation based on union discipline of a management representative, the conduct which prompted disciplinary action consisted of the representative's efforts to discharge his management responsibilities. * * * In fact, the Board has recently dismissed a Section S(b)(1)(B) complaint on the ground that the infraction of union rules for which the employer representative was disciplined did not involve the exercise of supervisory or managerial authority." NLRB brief at 15 in *Meat Cutters Union Local 81 v. NLRB, supra.*

Partially on the basis of these representations we enforced the Board's decision, but with the explicit caveat that "[t]he rule here applied by the Board only affects union discipline which is imposed upon a member, who has responsibilities as a representative of his employer in administering the collective bargaining agreement or the ad-

justment of employee grievances, because he has performed duties as a management representative. * * * The N.L.R.B. has made it clear that a union may legally discipline a supervisor-member for acts which are *not* performed by the individual in furtherance of his obligations as the employer's representative." *Meat Cutters Union Local 81* v. *NLRB, supra,* 147 U.S.App.D.C. at 379-380 n.12, 458 F.2d at 798-799 n.12. (Emphasis in original.)

Perhaps it is unfair to suggest that the Board is dissembling in seeking to draw some support for its present position from *Meat Cutters,* but certainly it is clear that the Board is changing its interpretation of the law to suit the case. *Meat Cutters* was an expansion of the *Oakland Mailers* doctrine, but it nevertheless was and remains directly tied to the principles *Oakland Mailers* properly implied from Section 8(b)(1)(B). The discipline of the supervisor in *Meat Cutters* was not totally unrelated to the performance of grievance settlement functions since by fining the supervisor the union was avoiding and undercutting a clause in the contract that provided that all matters pertaining to the proper application of the agreement shall be handled by certain grievance-arbitration procedures spelled out in the agreement. *See* 147 U.S.App.D.C. at 378 n.6, 458 F.2d at 797 n.6. More importantly, the underlying dispute was one of contract interpretation since the union's basic position was that the new meat procurement policy which the supervisor was fined for enforcing violated the collective bargaining agreement. *See* 147 U.S.App.D.C. at 378, 458 F.2d at 797. Discipline was used, in effect, as a tool to enforce the union's interpretation of the collective bargaining agreement. *See* page 18 *supra.* In the present cases, by contrast, no question of grievance settlement or contract interpretation is either directly or indirectly involved. The underlying dispute is not one of contract interpretation, but simply a lawful economic strike against the company to get a better contract.

The Board, in a final attempt to bring this case within the holding of *Meat Cutters*, argues that crossing the picket line to perform rank-and-file work is part of a supervisor's management function. The Board claims that management "considered its supervisors among those it could depend on" during a strike, and that the employer "had a right to expect the supervisor" to cross the picket line and perform rank-and-file struck work. *Local Union No. 2150, Int. Brhd of Electrical Wkrs, supra*, 192 NLRB No. 16 (slip opinion at 6). But saying that rank-and-file labor is part of a management function is tantamount to saying that black is white. Whatever the parameters of *Meat Cutters*' "management function" test may be, the term "management function" has no meaning except in contrast to the concept of rank-and-file work. And the Board's reference to management's "right" to expect supervisors to perform rank-and-file work is nothing but a facade by which the Board hopes to avoid analysis by assuming the answer to the question before it.

Try as one might, then, there is simply no way to derive the Board's decision in these cases from the literal language of Section 8(b)(1)(B), from the legislative history, or from the gloss that has been added to that section by *Oakland Mailers* and subsequent cases. The Board's decision in these cases, in the words of the learned trial examiner in *Illinois Bell*, "stretch[es] the statute beyond what I would otherwise consider the breaking point." *Int. Brhd of Electrical Wkrs*, 192 NLRB No. 17 (trial examiner's decision at 11) (1971).

In the final analysis, the Board's position in these cases does not rest on the language of Section 8(b)(1)(B), *Oakland Mailers*, or *Meat Cutters*, but rather on a policy which the Board for the first time now finds imbedded in Section 8(b)(1)(B)—that supervisors who are permitted by their employer to join unions owe their undivided loyalty to their employer in any dispute between the union and the em-

ployer. That the Board has just discovered this policy some 20-odd years after enactment of Section 8(b)(1)(B) makes us naturally suspicious that any such policy exists, especially since it appears that union discipline of supervisors is a long-standing problem that labor and management have attempted to resolve in a collective bargaining context for many years.[20] The Board apparently derives this interpretation of the statute in large part from Sections 2(3) and 14(a) of the Act which, as noted earlier, deprive supervisors of the protections of the Act and give employers the right to refuse to hire union members as supervisors. The Board's analysis starts off correctly enough when it states that in enacting these sections Congress recognized that an employer should be able to keep his supervisors out of unions in order to ensure their undivided loyalty. But the Board is mistaken in leaping to the conclusion that this same objective should be furthered by interpreting Section 8(b)(1)(B) to preclude all union discipline of supervisor-members when the employer has permitted his supervisors to maintain union membership. We draw precisely the opposite conclusion from the interrelationship between Sections 2(3) and 14(a), on the one hand, and Section 8(b)(1)(B) on the other. When Congress recognized that an employer should be able to have supervisors who owe him their undivided loyalty, it gave the employer a specific means to achieve such loyalty—the right to refuse to hire union members as supervisors, or in other words, the right to require employees to relinquish union membership upon promotion to a supervisory position. Congress never intended the inequitable result of permitting supervisors to have it both ways—joining unions with the consent of their employer and obtaining all the advantages of union membership without assuming the basic obligations normally incident to such membership.

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[20] *See* text at pp. 34-40 *infra*.

The policy questions raised in an analysis of the statutes are relevant not only in this context, but also in order to apply the principles set down in a line of Supreme Court cases concerning union discipline of members. Since, in our view, those cases control the ones before us, we now turn to consider the Supreme Court precedents and return in Part III to a discussion of the interrelationship between Section 8(b)(1)(B) and the exclusion of supervisors from the protections of the Act in Sections 2(3) and 14(a).

II

The Board's rough sailing through the complexities of Section 8(b)(1)(B) might, perhaps, be more understandable if the seas were entirely uncharted. But in fact union discipline of members who cross picket lines to do struck work has been the subject of a series of important Supreme Court decisions. The Board has considered these decisions in its past applications of Section 8(b)(1)(B), but inexplicably chose to ignore them in its decision in the present cases. The Supreme Court's decisions, unlike the Board's approach, set out a rational, workable interpretation of Section 8(b)(1) which balances a union's right to enforce reasonable discipline against the rights of employers and union members to be free from union overreaching.

The first and most important of these decisions is *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967). In all relevant respects, *Allis-Chalmers* is indistinguishable from these cases. There, as here, the union sought to impose reasonable fines on union members who had crossed a picket line during a lawful strike. In *Allis-Chalmers*, however, none of the fined members were supervisors, so the relevant provision governing the union's conduct was subsection (A) of Section 8(b)(1) rather than subsection (B). However, when the Supreme Court found the union innocent of any unfair labor practice, it did so not because

of anything peculiar to subsection (A), but rather because of its interpretation of the words "restrain or coerce" which are common to subsections (A) and (B). *See* Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 N.Y.U. L. Rev. 227, 268 (1968). Thus the Court stated: "It is highly unrealistic to regard § 8(b)(1), *and particularly its words 'restrain or coerce,'* as precisely and unambiguously covering the union conduct involved in this case." 388 U.S. at 179. (Emphasis added.) On the contrary, such a reading of Section 8(b)(1) would "attribute to Congress an intent at war with the understanding of the union-membership relation which has been at the heart of its effort 'to fashion a coherent labor policy' and which has been a predicate underlying action by this Court and the state courts. More importantly, it is to say that Congress limited unions in the powers necessary to the discharge of their role as exclusive statutory bargaining agents by impairing the usefulness of labor's cherished strike weapon." *Id.* at 183.

Of course, *Allis-Chalmers* did not mean that unions were free to impose discipline for any purpose at all. Section 8(b)(1) must be read so as to conform with the other provisions of federal labor law. *See, e.g., NLRB* v. *Int. Ladies Garment Wkrs Union, supra*, 274 F.2d 376; Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 Geo. Wash. L. Rev. 187, 193-196 (1969). Thus if a union rule "invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1)." *Scofield* v. *NLRB*, 394 U.S. 423, 429 (1969). *See NLRB* v. *Industrial Union of Marine & Shipbuilding Wkrs*, 391 U.S. 418 (1968). But if one thing is clear after *Allis-Chalmers*, it is that there is no "overriding policy of the labor laws" which prohibits reasonable union fines levied against members who cross a lawful picket line to perform rank-and-file struck work. In fact, quite the

contrary is true.

> "Integral to [the] federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . .' * * *"

NLRB v. *Allis-Chalmers Manufacturing Co., supra,* 388 U.S. at 181. (Footnotes omitted.)

The Board attempted in its *Oakland Mailers* decision to distinguish *Allis-Chalmers* from cases arising under Section 8(b)(1)(B).

> "* * * The Supreme Court, in finding lawful the union action involved in *Allis Chalmers,* relied in part on the proviso to Section 8(b)(1)(A), providing that the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership shall not be impaired. However, that proviso is limited to Section 8(b)(1)(A) of the Act only and is not a part of Section 8(b)(1)(B). * * *"

San Francisco-Oakland Mailers' Union No. 18, supra, 172 NLRB No. 252 (slip opinion at 3-4). It is quite clear, however, that the Board has misread the *Allis-Chalmers* decision. The Court expressly stated in its opinion that it was unnecessary to decide whether the proviso protected the union discipline there under scrutiny. *See NLRB* v. *Allis-Chalmers Manufacturing Co., supra,* 388 U.S. at 192 n.29. And as Mr. Justice Black pointed out in dissent: "[T]he Court correctly assumes that the proviso to § 8(b)(1)(A) cannot be read to authorize its holding." *Id.* at 200. Indeed, our own court just recently characterized the holding in *Allis-Chalmers* as follows:

> "* * * Instead of relying on the express language of

> the *proviso*, * * * the Supreme Court carefully analyzed the entire legislative history of Section 8(b)(1)(A), and it concluded that Congress did not intend to prohibit such internal union discipline by the prohibition against 'restraint' or 'coercion.' * * *"

Booster Lodge No. 405, Int. Assn of Machinists, etc. v. *NLRB, supra,* 148 U.S.App.D.C. at 125, 459 F.2d at 1149.

That the proviso is appended to Section 8(b)(1)(A) rather than to both that section and Section 8(b)(1)(B) is without significance in these cases. As we saw earlier, under the original congressional understanding Section 8(b)(1)(B) did not affect union discipline of supervisors, but only concerned direct attempts to restrain or coerce employers. So understood, it was unnecessary to repeat the proviso in Section 8(b)(1)(B). Now that *Oakland Mailers* has expanded Section 8(b)(1)(B) to encompass indirect coercion of employers through discipline of supervisors, the proviso gains significance for both subsections of Section 8(b)(1), for as the Supreme Court noted in *Allis-Chalmers*, the proviso was only part of "the repeated refrain throughout the debates on § 8(b)(1)(A) *and other sections* that Congress did not propose any limitations with respect to the internal affairs of unions * * *." 388 U.S. at 195. (Emphasis added.)

Apparently having sensed that its proviso distinction will not withstand analysis, the Board now puts forth a new argument. *Allis-Chalmers*, according to the Board, dealt only with internal union rules affecting the relationship between a member and the labor organization to which he belongs. Here, however, the Board claims, the union discipline does not concern legitimate internal union affairs, but affects primarily the employer who is external to the union-member relationship.[21]

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[21] The Board argues that the union has only a peripheral interest in fining the supervisors because supervisors make up such a small percentage of the total work force. In each case,

The Board's internal-external distinction, however, simply cannot be squared with the holding in *Allis-Chalmers*. Of course, the discipline in *Allis-Chalmers* had, and was intended to have, an external effect on the employer. By deterring strikebreakers the rule assured union solidarity and thereby allowed the union to bring greater economic pressure on the company. The discipline has precisely the same "external" effect in the present cases. If the anti-strikebreaking activity there can be characterized as "internal" it simply makes no sense to label the same sort of anti-strikebreaking rule in these cases as "external." The Board recognized as much in its *Oakland Mailers* decision: "[O]nly legitimate internal union affairs are protected under *Allis-Chalmers*. The *Allis-Chalmers* case involved a union's fining of its members for crossing picket lines. The primary relationship there affected was the one between the union and its members, and the union's particular objective—solidarity in strike action—was deemed by the Supreme Court a legitimate area for union concern in the circumstances involved." *San Francisco-Oakland Mailers' Union No. 18, supra*, 172 NLRB No. 252 (slip opinion at 4). (Footnote omitted.)

It is true that *Allis-Chalmers* concerns only so-called "internal" union discipline in the sense that the term "internal" refers to the manner in which the union enforces its

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the Board argues, the union fined less than 60 supervisors, while approximately 12,000 other employees in *Illinois Bell* and approximately 5,000 other employees in *Florida Power* remained, in the Board's words, "available for strike action." It is obvious, however, that the union had a definite and substantial interest in preventing even a small number of supervisors from performing rank-and-file struck work, since in the highly automated public utility industries involved in these cases a small work force composed of strikebreakers and non-union management personnel can evidently provide sufficient manpower to continue vital services in a strike, thereby cutting into the strike's effectiveness.

rule, not to the identity of the parties affected by the rule. Union discipline is internal when it is enforced through fines or expulsion from the union. It becomes "external," and a violation of Section 8(b)(1)(A) as well as other sections of the Act, when the union seeks to have the employer fire or take other measures against the recalcitrant union member.[22] The Supreme Court made this clear in its decision in *Scofield* v. *NLRB, supra,* its next major Section 8(b)(1) case after *Allis-Chalmers.* Describing its analysis in *Allis-Chalmers,* the *Scofield* Court stated:

> "• • • The Court thus essentially accepted the position of the National Labor Relations Board dating from *Minneapolis Star & Tribune Co.,* 109 N.L.R.B. 727 (1954) where the Board also distinguished internal from external enforcement in holding that a union could fine a member for his failure to take part in picketing during a strike but that the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority • • • • • •"

394 U.S. at 428. (Footnote omitted.) *See also NLRB* v. *Allis-Chalmers Manufacturing Co., supra,* 388 U.S. at 185; *Local 283, United Auto., Aircraft & Agric. Imp. Wkrs (Wisconsin Motor Corp.),* 145 NLRB 1097, 1104 (1964), *affirmed, sub nom. Scofield* v. *NLRB, supra.* The internal-external distinction thus has nothing to do with who is affected by the union discipline. As the Court recognized in *Scofield,* union dicipline normally affects all three participants in the union-management relation: employer, employee, and union. *Scofield* v. *NLRB, supra,* 394 U.S. at 431. But it does not follow from this that enforcement of

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[22] "[Sections 8(b)(1), 8(b)(2), 8(a)(1), 8(a)(2), and 8(a)(3)] • • • form a web, of which § 8(b)(1)(A) is only a strand, preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rules." *Scofield* v. *NLRB,* 394 U.S. 423, 428-429 (1969).

the rule violates the Act "unless some impairment of a statutory labor policy can be shown." *Id.* at 432.

The Board's last attempt to distinguish *Allis-Chalmers* relates to the matter of statutory labor policy. Subsequent to *Allis-Chalmers*, the Court made it clear that even internal enforcement of union rules violates Section 8(b)(1)(A) if such enforcement "invades or frustrates an overriding policy of the labor laws," *Scofield* v. *NLRB*, *supra*, 394 U.S. at 429, or if it contravenes "other considerations of public policy * * *" *NLRB* v. *Industrial Union of Marine & Shipbuilding Wkrs*, *supra*, 391 U.S. at 424. The Board argues, as we indicated at the close of Part I of this opinion, that the legislative history of Sections 2(3) and 14(a) of the Act indicates an overriding congressional policy in favor of supervisors who are completely subservient to their employer's will. As indicated earlier, we disagree with the Board's analysis of the interrelationship between Section 8(b)(1)(B) on the one hand and Sections 2(3) and 14(a) on the other, and it is to this issue that we now turn.

III

Although it is only since 1968 that the Board has sought to use Section 8(b)(1)(B) as a solution to conflict of loyalties problems arising from union discipline of supervisor-members, these problems are not of recent vintage.[23] Prior to passage of the National Labor Relations Act in 1935, it was quite common for foremen in many industries to become unionized in the same bargaining unit as their subordinates. *See Jones & Laughlin Steel Corp.*, 66 NLRB 386, 400 (1946). Conflict of loyalties problems were common, and employers were concerned "lest foremen should be subject to union discipline for differing with the local union in

[23] *See, e.g., Local Union No. 57* v. *Boyd*, 245 Ala. 227, 16 So.2d 705 (1944), where a union fined a supervisor-member for firing another union member for loafing on the job.

the interpretation of the terms of a contract." *Id.* at 401 n.27, *quoting* H. MILLIS (ed.), HOW COLLECTIVE BARGAINING WORKS 67 (1942). Such problems as arose were apparently worked out through collective bargaining. Unions recognized the legitimate concerns of employers in having contracts fairly administered by foremen, and means were provided for resolving disputes. "The unions [did] not, however, forego their right to discipline foremen for disobeying laws relating to internal union matters, or for deliberately disregarding union rules." *Ibid.*

The problem of supervisor-member conflict of loyalties first came before the Board under the 1935 Act in the form of the question whether foremen and other supervisors were "employees" under the statute, that is, whether management was required to engage in collective bargaining with foremen. The Board first held that foremen were "employees" and entitled to the protections of the Act, *see Union Collieries Coal Co.*, 41 NLRB 961 (1942), but abruptly shifted course a year later in *Maryland Drydock Co.*, 49 NLRB 733 (1943). The Board justified its shift on fears that conflicts of loyalties would arise if foremen belonged to the same union as the men under their supervision.

> "The very nature of a foreman's duties make him an instrumentality of management in dealing with labor. The duty of supervision with which he is principally charged implies a delegation of authority with respect to the selection, promotion, and discharge of the workers in his section. * * * To hold that the National Labor Relations Act contemplated the representation of supervisory employees by the same organizations which might represent the subordinates would be to view the statute as repudiating the historic prohibition of the common law against fiduciaries serving conflicting interests."

Id. at 740. (Footnote omitted.) The Board, however, soon shifted positions again, holding that foremen were entitled to mandatory collective bargaining under the Act if they

formed unions independent of those representing the rank and file. *See Packard Motor Car Co.*, 61 NLRB 4 (1945), *enforced*, 6 Cir., 157 F.2d 80 (1946), *affirmed*, 330 U.S. 485 (1947). And the next year, in *Jones & Laughlin Steel Corp., supra*, the Board held that supervisors were entitled to the protections of the Act even if they were represented by the same union that represented the rank and file.

The Board's opinion in *Jones & Laughlin Steel Corp.* is helpful in understanding the significance of the 1947 amendments to Sections 2(3) and 14(a) of the Act. To begin with, the Board recognized the conflict of loyalties problems arising from having supervisors belong to the same union that represents the rank and file. The Board noted the "serious and genuine concern about the effect of this decision upon the relations of management with its foremen, and the effect of the unionization of the latter upon their loyalty to the employer's interests." 66 NLRB at 402. But the Board concluded that "satisfactory solutions" to these problems "can be worked out by men of good will on both sides in the give-and-take of collective bargaining." *Id.* at 401. "[T]he union and the employer, neither of which is lacking in ingenuity, should not be discouraged by this Board from working out, at the bargaining table, contract clauses which will deal with this difficult situation. Such clauses can guarantee the maintenance of discipline by supervisors without fear of reprisal by the rank-and-file * * *." *Id.* at 402-403.

The question whether foremen and other supervisory employees were entitled as a class to the rights of self-organization, collective bargaining, and other concerted activities assured to employees by the 1935 National Labor Relations Act came before the Supreme Court in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947). The Court had before it the arguments "that unionization of foremen is from many points bad industrial policy, that it puts the union foreman in the position of serving two masters, divides his loyalty

and makes generally for bad relations between management and labor." *Id.* at 493. But the Court found policy to be irrelevant to its decision, and felt compelled to define the statutory term "employee" literally, thereby concluding that foremen and other supervisors were entitled to the Act's protections.

Congress picked up the Court's cue when it enacted the 1947 amendments to the Act. As a matter of policy, the Congress felt that employers should not be forced into having unionized supervisors.

> "The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with * * * our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them."

1 Legis. Hist. 305. The legislative history of Sections 14(a) and 2(3) clearly indicates that the purpose of these provisions was to reverse the result of the *Packard* case so that no employer would be required under the Act to bargain collectively with his foremen or to hire foremen who were union members.

> "What the bill does is to say * * * [t]hat no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust."

1 Legis. Hist. 308. (Emphasis in original.) *See also Int. Ladies' Garment Wkrs Union* v. *NLRB*, 2 Cir., 339 F.2d 116, 122 (1964). In the words of the Senate Report:

> "It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees."

1 Legis. Hist. 411.

While Section 14(a) provides that "no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining," it also expressly provides that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization * * *." The purpose of this provision is also clear from the legislative history.

> "The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. * * *"

1 Legis. Hist. 308.

> "* * * It should be noted that all that the bill does is to leave foremen in the same position in which they were until the Labor Board reversed the position it had originally taken in 1943 in the *Maryland Drydock case* * * *. In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. * * *"

1 Legis. Hist. 411.

The legislative history of Section 14(a) is important in two respects. First, it is clear that the supervisory exclusion was enacted precisely because Congress assumed that when supervisors became union members they were "obligated to those on the other side" and were "subject to the influence and control of the rank and file union." And Congress solved the conflict of loyalties problem by giving management the right to make the would-be supervisor choose between union loyalty and rank-and-file status on the one hand and management loyalty and supervisory status on the other.

Second, by expressly providing that foremen could unionize, and by indicating that employers who so desired could

continue to bargain collectively with supervisors, Congress effectively gave employers an option. Those who wished to do so could continue to hire union members as supervisors and could continue to engage in collective bargaining with supervisors, resolving whatever conflict of loyalties problems arose through the traditional give-and-take of collective bargaining approved in *Jones & Laughlin Steel Corp., supra,* to arrive at contract clauses dealing with the problem. *See* page 36 *supra.* On the other hand, those employers who wanted to settle the conflict of loyalties problem once and for all would be within their rights in refusing to hire union members as supervisors and refusing to engage in collective bargaining with supervisors.

This option approach to an employer's rights under Section 14(a) has received the tacit approval of the courts. For example, a union commits no unfair or unlawful act in proposing that supervisors be covered by the collective bargaining agreement, *Sakrete of Northern California, Inc.* v. *NLRB,* 9 Cir., 332 F.2d 902, 908 (1964), *cert. denied,* 379 U.S. 961 (1965), but a union does commit an unfair labor practice in trying to coerce an employer into agreeing to hire only union members as foremen. *See Int. Typographical Union Local 38* v. *NLRB,* 1 Cir., 278 F.2d 6 (1960), *affirmed by equally divided Court,* 365 U.S. 705, 707 (1961). An employer is within his rights in refusing to engage in collective bargaining over supervisors, *cf. Safeway Stores, Inc.* v. *Retail Clerks Int. Assn,* 41 Cal.2d 567, 261 P.2d 720 (1953), and supervisors are routinely excluded from a certified bargaining unit at the employer's request. *See, e.g., Federal Compress & Warehouse Co.* v. *NLRB,* 6 Cir., 398 F.2d 631 (1968); *NLRB* v. *Corral Sportswear Co.,* 10 Cir., 383 F.2d 961 (1967). On the other hand, courts have approved contracts in which management agreed to hire only union members as foremen and where the conflict of loyalties problem was resolved by clauses in the collective bargaining agreement limiting the union's right to discipline

supervisor-members. *See, e.g., NLRB* v. *News Syndicate Co.*, 2 Cir., 279 F.2d 323 (1960), *affirmed*, 365 U.S. 695 (1961). *Cf. Evening Star Newspaper Co.* v. *Columbia Typographical Union No. 101*, D. D.C., 141 F.Supp. 374 (1955), *affirmed*, 98 U.S.App.D.C. 206, 233 F.2d 697 (1956).

In applying this option approach, it has always been assumed, consistent with the legislative history, *see* page 38 *supra*, that once an employer permits his supervisors to join unions or agrees to engage in collective bargaining with unionized supervisors, he no longer can claim their undivided loyalty in every employer-union dispute except to the extent that the collective bargaining agreement ensures such loyalty. *See, e.g., NLRB* v. *News Syndicate Co.*, *supra*, 279 F.2d at 330:

> "* * * The foremen, under the contract at least, were not subject to the conflicting obligations of two masters. *Regardless of the Union obligations to which, without more, a foreman would be subject by reason of his Union membership,* * * * the contract specifically provides that: 'The Union shall not discipline the foreman for carrying out the instructions of the publisher or his representative in accordance with this agreement.' * * * By these provisions the parties clearly indicated that the foremen are *solely* [this emphasis in original] the employers' agents and that they are under an obligation to act in accordance with the agreement, *in spite of Union ties and obligations which otherwise might control.* * * *"

(Emphasis added; footnote omitted.) *See also NLRB* v. *News Syndicate Co.*, 365 U.S. 695, 701 (1961); *Int. Typographical Union Local 38* v. *NLRB*, *supra*, 278 F.2d at 12. *Cf. Local Union No. 1055* v. *Gulf Power Co.*, N.D. Fla., 175 F.Supp. 315 (1959); *Safeway Stores, Inc.* v. *Retail Clerks Int. Assn*, *supra*.[24] And, until now, it seemed that

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[24] Prior to enactment of the 1947 amendments, the Retail Clerks International Association represented store managers for collective bargaining purposes, and these managers were

the Board shared this assumption. To justify its holding that certain supervisors could actively participate in union affairs, the Board recognized that supervisor-members "owe allegiance at least as much to the Union as to their employers. They are agents of both." *Nassau and Suffolk Contractors' Assn, Inc.*, 118 NLRB 174, 182 (1957).

Thus, while now purporting to interpret Section 8(b)(1)(B) so as to enforce the underlying policy of Section 14(a) in favor of management's right to loyal supervisors, the Board in fact acts contrary to the very assumption engendering enactment of Section 14(a), namely, that when a supervisor joins a union he is under certain obligations to the union which conflict with his loyalty to his employer.

Throughout the lengthy discussion of supervisor-union member conflict of loyalties in the legislative history of the 1947 amendments, there is not a single indication that Section 8(b)(1)(B) was in any way related to the comprehensive solution to the conflict of loyalties problem found in

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covered by collective bargaining agreements. In 1949, after passage of the amendments, new contract negotiations came up and Safeway announced its intention not to bargain with respect to managers any more and not to recognize the union as their representative. The union struck over this point, the trial court enjoined the strike, and the California Supreme Court affirmed:

> "* * * As members of the defendant unions [store managers] would under union rules be in duty bound to advance the cause of the community of interest of store managers and clerks in any dispute or disagreement with their principal. They would be under constant apprehension of the penalties under union rules, such as fines, suspension, or expulsion. It is eminently proper that management supervisors, the store managers in this case, be kept free from the divided loyalty that would be engendered by compulsory membership in the defendant local unions. * * *"

41 Cal.2d at ——, 261 P.2d at 726.

Sections 2(3) and 14(a).[25] Section 8(b)(1)(B) was intended to deal with a problem separate and distinct from the problem of supervisor-union member conflict of loyalties, as is evident from the different scopes of the Section 2(3) supervisor exclusion and Section 8(b)(1)(B). The supervisor exclusion in Section 2(3), defined in Section 2(11), applies not only to individuals having authority to "adjust [employee] grievances," but also to any individual "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees * * *." The scope of Section 8(b)(1)(B), in contrast, is much narrower, and concerns only those individuals who represent the employer "for the purposes of collective bargaining or the adjustment of grievances." Since the scope of Section 8(b)(1)

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[25] That the supervisory exclusion in §§ 2(3) and 14(a) is unrelated to the § 8(b)(1)(B) unfair labor practice provision is further confirmed by the legislative history. Sections 2(3) and 14(a) of the 1947 amendments had their forerunners in the Case bill passed by both houses of Congress in 1946 but vetoed by President Truman. *See* H.R. 4908, 79th Cong., 2d Sess. (Jan. 14, 1946). Section 9(a) of the Case bill, just like the 1947 amendments, amended § 2(3) of the Act by adding supervisors as a class of individuals excluded from the statutory definition of "employees." Section 9(c) of the bill, just like amended § 14(a) in 1947, provided that "[n]othing herein shall prohibit a supervisory employee from becoming or remaining a member of a labor organization." The legislative history of the 1947 amendments clearly shows that §§ 2(3) and 14(a) in the 1947 amendments merely sought to reenact the provisions of the Case bill, the only difference being a minor one in the definition of supervisors. *Compare* 1 Legis. Hist. 308 *with* S. Rep. No. 1177, 79th Cong., 2d Sess., at 9-10, 17-19 (1946). *Compare* § 2(11) of the Act, 29 U.S.C. § 152(11), *with* § 9(b) of the Case bill, H.R. 4908, *supra*. What is significant for present purposes is that the Case bill, while containing virtually identical forerunners of §§ 2(3) and 14(a), did not contain any provision even remotely similar to § 8(b)(1)(B).

(B) is narrower than that of the supervisor exclusion in Section 2(3), the Board's approach achieves the anomalous result of having certain supervisor-members—those coming within the definitions of both Sections 2(3) and 8(b)(1)(B)—immune from all union discipline where there is a dispute between the union and the employer, while other supervisor-members—those coming within the definition of Section 2(3) but falling outside the definition of Section 8(b)(1)(B)—remain subject to union discipline. Such a dichotomy is awkward on its face, and makes no sense if one accepts the Board's assumption that under Section 14(a) a supervisor owes his undivided loyalty to his employer not only where his employer exercises his right to refuse to hire union members as supervisors, but also where the employer permits supervisors to join unions.

Not only is there no indication of any legislative purpose to make Section 8(b)(1)(B) an integral part of the solution to supervisor-union member conflict of loyalties problems, but the result achieved by the Board's interpretation of Section 8(b)(1)(B) is clearly inconsistent with the concept of union membership as understood by Congress. The "'contractual conception of the relation between a member and his union widely prevails in this country . . .'" *NLRB* v. *Allis-Chalmers Manufacturing Co., supra,* 388 U.S. at 182, *quoting Int. Assn. of Machinists* v. *Gonzales,* 356 U.S. 617, 618 (1958).

> "The rationale of the contract theory is that a member, by joining the union, enters into a contract, the terms of which are expressed in the union constitution and by-laws. The member consents to suspension or expulsion according to the provisions of that contract • • • • • • •"

Summers, *Legal Limitations on Union Discipline,* 64 HARV. L. REV. 1049, 1054 (1951).[26] The Board's immunity from

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[26] Compare this conception of union membership with that of counsel for the charging party in *Illinois Bell,* who char-

union discipline for strikebreaking supervisors makes a shambles of the mutuality of obligation implicit in the contract approach to union membership. "Strikebreaking is uniformly considered sufficient reason for expulsion * * * for it undercuts the union's principal weapon and defeats the economic objective for which the union exists." *NLRB* v. *Allis-Chalmers Manufacturing Co., supra,* 388 U.S. at 181-182 n.8, *quoting* Summers, *Disciplinary Powers of Unions,* 3 IND. & LAB. REL. REV. 483, 495 (1950).

In addition, the Board's interpretation of Section 8(b)(1)(B) reaches a result inconsistent with ordinary standards of equity and fairness. In *Illinois Bell,* for example, the employer recognized the union as the exclusive bargaining agent for some of its supervisory personnel. These supervisors directly benefit from union membership, not just from the fringe benefits available to all union members, but from the contract which the union negotiates with management. True, the present contract does not determine their wages, but these employees do benefit from other contract provisions such as that establishing vacation rights. These supervisors might benefit from a suc-

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acterized the union's oath of allegiance required of new members as "mumbo jumbo in the union hall * * *." Transcript of hearing at 392. As to counsel's suggestion that the union security clause forced employees to take an oath of allegiance to the union, *see Local Union No. 749, Int. Brhd of Boilermakers, etc.* v. *NLRB,* —— U.S.App.D.C. ——, 466 F.2d 343 (1972), *cert. denied,* —— U.S. ——, 41 U.S. L. WEEK 3447 (Feb. 20, 1973), which held that a union may not lawfully request an employer with whom it has a union security agreement to fire an employee who, although willing to pay the requisite union dues and fees, refuses to assume formal union membership by signing the union's membership application card. *See also NLRB* v. *General Motors Corp.,* 373 U.S. 734, 742 (1963); *Union Starch & Refining Co.* v. *NLRB,* 186 F.2d 1008, *cert. denied,* 342 U.S. 815 (1951). *Cf.* note 27 *infra.*

cessful strike, for example, if the purpose or result of the strike was to obtain longer vacations or to improve some other condition of employment applicable to all members of the bargaining unit, supervisory or rank and file. Can it fairly be said that Congress intended that supervisor-members can perform rank-and-file struck work, undercutting a strike from which they serve to benefit, and remain immune from union discipline while all other members of the bargaining unit remain bound by the majority decision of the union to go out on strike?

The inequity in the Board's approach to Section 8(b)(1)(B) may well have been tacitly conceded by both the Board and the employer in *Florida Power* when, by stipulation, it was agreed that no unfair labor practice charge would be based on union discipline of those supervisors who were members of the bargaining unit and who had their wages and conditions of employment determined by the collective bargaining agreement. *See* note 8 *supra*. Were the Board to have applied Section 8(b)(1)(B) to union discipline of these supervisor-members, the Board would have prevented the union from disciplining strikebreaking supervisors whose very wages were the subject of the on-going strike. We note, however, that nothing in the Board's approach would limit Section 8(b)(1)(B) so that it would not apply to union discipline of these supervisors. The Board's position is that a union cannot fine supervisor-members for "furthering the interests of the Employer in a dispute not between the Union and the supervisor-union members but between the Employer and the Union." *Local Union No. 2150, Int. Brhd of Electrical Wkrs, supra*, 192 NLRB No. 16 (slip opinion at 6). Under such an approach it is irrelevant whether or not the supervisors are members of the collective bargaining unit and whether or not their wages and conditions of employment are negotiated for them by the union. That the Board places no significance on the fact that supervisors are members of the collective

bargaining unit represented exclusively by the union is demonstrated in *Illinois Bell* where the Board based its finding of a Section 8(b)(1)(B) violation on discipline of supervisor-members both outside and within the collective bargaining unit. *See* pages 9-10 *supra.*

Those supervisor-union members who feel that the union is not adequately representing their interests, or who feel that they do not wish to be bound to support the union in its economic disputes with management, are free at any time to resign from union membership. As the Supreme Court recently made clear, once they do so, and once they voluntarily agree to relinquish the benefits of union membership, they are no longer subject to union discipline. *See NLRB* v. *Granite State Joint Board, supra; id.* at 218 (Mr. Chief Justice Burger, concurring).[27] But it is unreasonable for supervisors to expect to be able to enjoy either the fringe or the direct benefits of union membership without bearing the obligation of supporting the union in its economic disputes with the employer.[28]

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[27] Nor is it significant that the collective bargaining agreement in *Illinois Bell* contains a union security clause. That clause, like the union security clause in *Granite State Joint Board,* requires as a condition of employment that members of the bargaining unit remain union members in good standing, but provides that an employee shall be deemed to be a member in good standing "so long as he pays or tenders to the Union an amount equal to the regularly recurring monthly Union dues * * *." We intimate no views concerning a union's power to discipline members where a security clause in the collective bargaining agreement purports to require active union membership as a condition of employment. *See also Local Union No. 749, Int. Brhd of Boilermakers, etc.* v. *NLRB, supra* note 26, —— U.S.App.D.C. at —— n.3, 466 F.2d at 345 n.3.

[28] "I question that Congress intended by Section 8(b)(1)(B) to compel unions to retain representatives of manage-

See NLRB v. *San Francisco Typographical Union No. 21*, 9 Cir., —— F.2d ——, —— (Nos. 71-2949 & 71-2987, decided May 18, 1973) (slip opinion at 4).

The lack of equity and fairness in the Board's approach is also evident when we look at the situation from the employer's perspective. Section 14(a) gives the employer a means to obtain the undivided loyalty of his supervisors. If the employer, however, chooses not to exercise his rights under that section, permits his supervisors to join unions and agrees to engage in collective bargaining with the union over supervisors, the employer cannot still insist on the supervisors' undivided loyalty in every union-employer dispute, no matter how unrelated the subject of that dispute is to the supervisory function. The employer, of course, benefits from having supervisors continue membership in unions. He can follow the commendable practice of elevating supervisors from the rank and file, without having to compensate these supervisors for any loss in pension or death benefit rights they would incur were the employer to exercise his Section 14(a) rights and force them to resign from union membership upon achieving supervisory status.[29] Management cannot have its cake and eat it too. As Professor Gould has pointed out:

> "• • • [S]upervisors who remain union members are, most often obtaining additional benefits. Fre-

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ment on their membership rolls. It appears to me that individuals who aspire to be representatives of management and to receive the perquisites of management must be prepared to relinquish the benefits afforded by union membership. If they elect to eat the icing, they should eat the cake; if they choose union membership, they choose to abide by its constitution." *Local Union No. 2150, Int. Brhd of Electrical Wkrs*, 192 NLRB No. 16 (trial examiner's decision at 6) (1971).

[29] This was apparently what motivated Illinois Bell to permit District Superintendents to remain union members. *See* text at p. 10 *supra*.

quently, they have remained members in order to retain possession of withdrawal cards which will make it less expensive for them to re-enter the trade or another plant under union jurisdiction. Under the *Allis-Chalmers* rationale, this would seem to indicate a pledge of allegiance by the supervisor and therefore should be deemed consent by such an individual to render himself liable to financial obligations where the union's interest is direct and where the conduct engaged in is somewhat distant from basic supervisory functions. If the employer is unduly harmed by such a rule, it seems to me that its obligation is to make the supervisory position financially attractive enough for the supervisor to forego the benefits of union membership and to resign."

Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of* Allis Chalmers, 1970 DUKE L. J. 1067, 1129.

This is not to say, of course, that by permitting his supervisors to join unions the employer completely waives his right to their loyalty. Even if he permits them to join unions, Section 8(b)(1)(B), as interpreted by *Oakland Mailers* and *Meat Cutters*, immunizes them from union discipline imposed for the manner in which they perform their supervisory functions. In addition, the employer is free to seek further immunity from discipline through the collective bargaining process. For example, if the employer shares the Board's fear that when supervisors are forced not to perform rank-and-file struck work they become biased against the employer in the later performance of their supervisory functions, the employer may condition his permission for supervisors to remain union members upon the union's agreeing to a bargaining contract clause that immunizes supervisors from union discipline for performing rank-and-file struck work. As we have already seen, such an agreement by which the employer permits supervisors to join unions upon condition that the union give up part of its control over the super-

visors is a mode of dealing with the problem of supervisor conflicts of loyalty that, in contrast to the Board's approach, has a firm basis in history both before and after passage of the 1947 amendments. Not only is it historically sound, but it comports with the Act's pervasive focus on collective bargaining as the means for resolving labor-management conflicts. *See Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, (1937). Where the employer has bargained for immunity from union discipline for his supervisors, such a clause may be enforced through the normal grievance adjustment procedure or arbitration machinery established in the contract to resolve alleged contract violations.[30] But where the employer has agreed to union membership for his supervisors without obtaining in return some concession from the union with respect to the immunity of supervisors from discipline, interpreting Section 8(b)(1)(B) so as to make the supervisor subject to an undivided loyalty to his employer in all union-employer disputes permits the employer to abrogate its part of the bargain. We can "discern no basis in the statutory policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table." *Scofield* v. *NLRB*, *supra*, 394 U.S. at 433.

To be sure, the Labor Board is entitled to great deference when it interprets the act it administers. *See, e.g., Brooks* v. *NLRB*, 348 U.S. 96 (1954); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). But this deference has its limits. In the final analysis, "administrative ex-

[30] Accordingly, we need not decide in these cases whether in disciplining supervisors the unions violated provisions of the collective bargaining agreement (or the Letter of Understanding in *Illinois Bell*) which might be read to restrict the union's right to discipline supervisors. *See* text at pp. 7 & 10 *supra*.

perience is of weight in judicial review only to this point—it is a persuasive reason for deference to the [Board] in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding. Surely an administrative agency is not a law unto itself * * *." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 215 (1947) (Mr. Justice Jackson, dissenting).

Where, as here, the Board's interpretation of the statute cannot be derived from the statutory language or from prior Board precedent, and where that interpretation conflicts with Supreme Court precedent, with the legislative history, and with basic principles of fairness, the Board acts outside the law. Section 8(b)(1)(B) cannot reasonably be read to prohibit discipline of union members—supervisors though they be—for performance of rank-and-file struck work.

Reversed and remanded.

LEVENTHAL, *Circuit Judge*, with whom *Circuit Judge* MCGOWAN joins, *concurring*: I concur in the opinion for the court authored by Judge Wright, which includes what I think are the salient points of this case. My separate word is not in derogation of that opinion but is added, first, to note that the same result obtains even if there should be disagreement with some aspects of the court's opinion, and second because I think the soundness of our result is underscored by thinking of this case in a large context of Congressional policy on upward mobility of labor.

Congress did not accept the view that supervisors, such as foremen, are necessarily and for all purposes to be

identified as completely integrated in management. Foremen are officers of management, but of a special kind; like non-commissioned sergeants, they bear a special relationship to the employee troops, one that promotes two-way communication and working relationships, and is of unique value to the entire enterprise.

There would be no problem if Congress had accepted a clear-cut view of foremen, as wholly integrated with management. This they could have done, by excluding foremen from employees' unions, or removing them from any union discipline, a course that was counseled in the name of good sense.[1] But as in so many other aspects of labor-management legislation, Congress was more interested in an accommodation of tensions than the tidiness of abrupt solutions.[2]

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[1] *See* Statement of Senator Ball, II Legislative History of the Labor Management Relations Act, 1947 (N.L.R.B. 1948) at 1524, quoted in Meat Cutters Union Local 81 v. N.L.R.B., 147 U.S.App.D.C. 375, 381 n.16, 458 F.2d 974, 980 n.16 (1972).

[2] In Carpenters' Union v. Labor Board, 357 U.S. 93, 99-100, Mr. Justice Frankfurter described the compromises inherent in the Taft-Hartley Act, and the judicial path to observing them, as follows:

It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy against secondary boycotts as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law. The problem raised by these cases affords a striking illustration of the importance of the truism that it is the

One thing Congress did do was to give a complete option to any employer who placed paramount value on complete and unquestioned loyalty in the foreman. That employer has the absolute and unqualified right to insist that no foreman or supervisor be a member of an employee's union. § 14(a), 29 U.S.C. § 164(a) (1970).

Such an employer attitude, however, involves costs to the employer who appreciates the benefits to the enterprise from the upward mobility of labor. Not a few enlightened managements are on the lookout for talent in the ranks, able to infuse management levels with the special awareness, aptitudes and attitudes of production experience.

Mobility of union labor is restricted if departure from the union means surrender of existing or prospective economic benefits. Such surrender requirements are not a rarity in the various benefit and insurance plans sponsored by labor unions. Congress might conceivably have required that such plans be revised so as to "vest" economic benefits on reasonable terms. But it has not yet even required vesting in the more glaring case of employer pension plans, which often remove pension rights on transfers to other employers, thus limiting mobility of labor.[3]

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business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted. But such ascertainment, that is, construing legislation, is nothing like a mechanical endeavor. It could not be accomplished by the subtlest of modern "brain" machines. Because of the infirmities of language and the limited scope of science in legislative drafting, inevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials.

[3] Roark v. Boyle, 142 U.S.App.D.C. 390, 397-98, 439 F.2d 497, 504-05 (1970).

The option given by Congress is an accommodation to employers, enabling them to permit their supervisors to stay on as members of an employers' union, without surrender of the economic benefits available to members of the union.

The foremen who are permitted by their employers to maintain membership in the ranks of both union and management will have dual ties, and there is the prospect of clash and tension. That tension may not be entirely felicitous so far as management is concerned, but when elected by the employer it reflects a trade-off, making it preferable to available alternatives.

The employer is protected by the statute against the coercion implicit in certain union exercise of control over members. The clear language of the statute protects supervisors against discipline as union members, and means the control of the union must give way, when there is a question of union control over the choice of a supervisor,[4] or interference with the performance of the supervisor in "adjusting grievances."[5]

Whether or to what extent this approach may be extended to limit union control over members in other respects, it cannot be extended to the cases before us, which lie at the opposite end of the spectrum. A union member who performs rank-and-file struck work executes an act which is inherently destructive of the existence of the union. In contemplating that supervisors might continue as members of the union, Congress did not contemplate that the unions would have to surrender the elemental right

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[4] *See* cases cited in the majority opinion at p. 14.

[5] San Francisco-Oakland Mailers' Union No. 18, 172 NLRB No. 252 (1968).

of self-preservation, and to continue the good standing of agents of its own destruction.[6]

This case does not involve a management instruction to a foreman to perform managerial or supervisory work. Indeed Illinois Bell did not issue any instruction relative to the supervisors to work during the strike. If the management wishes to take the position that even rank-and-file work is the duty of a supervisor during a strike, then that is such an incursion on a union's elemental right of self-preservation as to require management to prohibit the supervisor from remaining with the union. A management insisting on absolute loyalty, to such an extent, must bear the potential expense of the economic rights supervisors will surrender by withdrawing from the union.

I do not take *Meat Cutters, supra* note 1, to be in conflict with this view. That case involved the implementation by a manager of a Safeway store of a company directive to terminate the grinding and slicing of certain meats at the retail stores, and to henceforth fill market needs by

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[6] *See* Allis Chalmers, 388 U.S. 175, 181-82 (1967), where the Court observed that " '[t]he power to fire or expel strike-breakers is essential if the union is to be an effective bargaining agent. . . .' ", *citing* Summers, Legal Limitations on Union Discipline, 64 HARV L. REV. 1049 (1951). It then noted that "Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strike-breakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments."

Similarly, the 1947 Taft-Hartley Act language including the ban on secondary boycotts was not applied literally, but was held to be subject to an implied exception excluding from the ban the traditional weapon of primary picketing. NLRB v. International Rice Milling Co., 341 U.S. 665, 670-71 (1951). This approach was confirmed in the 1959 amendments. Grain Elevator, Flour & Feed Mill Workers v. NLRB, 126 U.S.App.D.C. 219, 223-224, 376 F.2d 774, 778-79 (1967).

ordering meat in prepared form from a warehouse. While the implementation of this management decision had the effect of eliminating some work for the Union Local 81,[7] it was not inherently destructive of the Union. Without reconsidering the broad sweep of the doctrines of "indirect" interference and management loyalty voiced in *Meat Cutters*, they must be taken in the light of the factual problem then before the court, and cannot soundly be extended so as to prohibit union discipline of supervisors who perform rank-and-file struck work.

The limits on the protection for management loyalty are clearly posed by these cases, and reflect, I believe, an underlying congressional policy on the question of upward mobility in the labor market. Congress permits the employer to permit a rank-and-file worker to upgrade his employment situation by becoming a supervisor without surrendering certain rights as a member of an employees union. When, however, the transition is complete, and the supervisor is to side with management over the very existence of the union, the supervisor and management must make a choice and assume the consequences.

MacKinnon, *Circuit Judge*, with whom Tamm, Robb and Wilkey, *Circuit Judges*, join, *dissenting*: The majority expresses its approval of the Board's interpretation of section 8(b)(1)(B)[1] as set out in *Oakland Mailers* and its

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[7] 147 U.S.App.D.C. at 378 n. 7, 458 F.2d at 797 n.7.

[1] 29 U.S.C. § 158(b)(1)(B) (1970) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

progeny. In *Oakland Mailers* the Board held illegal union actions which "were designed to change the (employer's) representatives from persons representing the viewpoint of management to persons responsive or subservient to (the union's) will."[2] In reaching the conclusion that the union's imposition of discipline on supervisors because of the manner in which they interpreted and applied the collective bargaining agreement violated section 8(b)(1)(B), the Labor Board noted:

> In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. *That [the union] may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the [employer] by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [employer's] control over its representatives. Realistically, the Employer would have to replace its foremen or face de facto nonrepresentation by them.*[3]

Thus, there is unanimous agreement on this court that section 8(b)(1)(B) prohibits union discipline of supervisory personnel for acts performed by them in the course of their supervisory or managerial duties. However, there is considerable disagreement as to whether a supervisor's performance of rank-and-file work during a strike at the direction of his employer constitutes part of his supervisory or managerial duties protected by section 8(b)(1)(B). Basically the majority's position is that the Board has stretched section 8(b)(1)(B) to the breaking point, in light of the

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[2] San Francisco-Oakland Mailers' Union No. 18, 172 NLRB 2173 (1968).

[3] *Id.* (emphasis added). *See* New Mexico District Council of Carpenters, 177 NLRB 500, (1969), *enfd.*, 454 F.2d 1116 (10th Cir. 1972).

legislative history of that section and sections 2(3)[4] and 14(a),[5] and the *Allis-Chalmers*[6] case, when it has sought to prohibit the union discipline of these supervisors. I find many defects in the majority's analysis, and shall deal with the pertinent statutes and legislative history first, and take up the *Allis-Chalmers* case lastly.

I.

Underlying much of the majority's criticism of the Board's decision is the belief that a strike is "totally unre-

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[4] 29 U.S.C. § 152(3) (1970) provides:

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

[5] 29 U.S.C. § 164(a) (1970) provides:

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

[6] N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

lated" to the collective bargaining process. Thus, the majority argues that even if the union's discipline here has the effect of making a supervisor pro-union during the strike, it "does not follow that this change in attitude will affect his performance of his collective bargaining or grievance adjustment function." This is because, it is argued, when a supervisor performs rank-and-file work during a strike at the direction of his employer "he is no longer acting as a management representative." Whereas, when a supervisor performs his normal supervisory work, engages in collective bargaining, or adjustment of grievances, he is clearly acting as a management representative. Since, in the majority's view, performing struck work during a strike at the request of management is "unrelated" to the performance of his supervisory function, a supervisor will never be forced into the situation of having to serve two masters, as the Board found would be the case—for he "will be serving them at different times."

The majority's reasoning ignores the realities of the collective bargaining process. A strike is *not* "totally unrelated" to the supervisor's performance of collective bargaining functions. As the Board argued before this court, "the outcome of an economic strike . . . determines the substance of an agreement between the disputing parties and is thus a far more fundamental dispute, and one with more at stake, than a quarrel over the interpretation of a portion of a previously negotiated agreement or over its application to a given situation or individual."[7] It is well recognized that "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; *it is part and parcel of the process of collective bargaining.*" *N.L.R.B. v. Insurance Agents International Union*, 361 U.S. 477, 495 (1960) (emphasis added). It is readily apparent,

[7] Brief for the National Labor Relations Board at 15-16.

therefore, that when supervisors' actions during an economic strike further the interests of their employer, they are performing in a manner which could reasonably be expected from such persons. *See Local Union No. 2150, I.B.E.W.*, 192 NLRB No. 16 (1971). *See also, Texas Co. v. N.L.R.B.*, 198 F.2d 540 (9th Cir. 1952). As management representatives, supervisory personnel may be requested by management to enhance the bargaining position of their employer during a dispute between it and the particular union involved.[8] Yet this is the precise activity for which the supervisors in question were disciplined by these unions.

Not only has the majority taken an unrealistic look at the role of a strike in the collective bargaining process, it completely disregards the Labor Board's assessment of what will be the realistic consequences of union discipline of supervisors during confrontations between the union and the employer. In both these cases the Board relied on its analysis of the same issue in *Local Union No. 2150, I.B.E.W.*, decided the same day as *Illinois Bell Telephone*, wherein the Board found that

> [t]he Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, *the fines*, if found to be lawful, *would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer has a right to expect the supervisor to perform.* The Employer could no longer count on the complete and undivided loyalty of those it has selected to act as its collective bargaining agents

[8] There is no question that supervisors enhance the bargaining position of their employer when they perform rank-and-file work during a strike, since their actions reduce the severity of the economic pressure borne by their employer as a result of the work stoppage.

> or to act for it in adjusting grievances. Moreover, such fines clearly interfere with the Employer's control over its representatives.[9]

The Labor Board has drawn an inference from the evidence before it, concluding that the unions' discipline of these supervisors will interfere with the performance of their supervisory duties. Such inferences are not to be disturbed by a reviewing court merely because in its own opinion it disagrees with the rightness of the Board's judgment. *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 48-50 (1954); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 490 (1951); *N.L.R.B. v. Nevada Consolidated Copper Corp.*, 316 U.S. 105 (1942). Rather, as with other findings of fact, the proper test is whether the inference is supported by substantial evidence in the record. And under this standard, I see no reason to disagree with the Board's assessment of the effect of the union discipline upon the supervisor-employer relationship.

Further, the majority embraces a rule which makes the *type* of work a supervisor performs during a strike the determinative factor in section 8(b)(1)(B) cases involving the legality of union discipline. This distinction makes no sense from the standpoint of the Congressional purpose underlying sections 8(b)(1)(B), 2(3), and 14(a). The Board's present interpretation of section 8(b)(1)(B) was

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[9] Local Union No. 2150, I.B.E.W., 192 NLRB No. 16, slip op. at 6-7 (1971) (emphasis added). *See* New Mexico District Council of Carpenters, 177 NLRB 500, 502 (1969), *enfd.*, 454 F.2d 1116 (10th Cir. 1972); Meat Cutters Local Union No. 81 v. N.L.R.B., 147 U.S.App.D.C. 375, 379-80, 458 F.2d 794, 798-99 (1972); N.L.R.B. v. Locals Nos. 15-P and 272, Lithographers, 437 F.2d 55, 57 (6th Cir. 1971); N.L.R.B. v. Sheet Metal Workers, Local 49, 430 F.2d 1348, 1349 (10th Cir. 1970).

set out in *Local Union No. 2150 I.B.E.W.*, wherein it quoted from *Toledo Blade:*

> The Board's decision in the *San Francisco Mailers* case, underscores the . . . import of Section 8(b)(1)(B) as a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests of their employers. As the Board held, such discipline by a union, even though the employer may have consented to the compulsory union membership of the supervisor under a union-security clause, is an unwarranted "interference with [the] employer's control over its own representatives," and deprives the employer of the undivided loyalty of the supervisor to which it is entitled.[10]

When a union disciplines a supervisor for crossing a picket line to perform rank-and-file work at the request of his employer, that discipline *equally* interferes with the employer's control over his representative and *equally* deprives him of the undivided loyalty of that supervisor as in the case where the discipline was imposed because of the way the supervisor interpreted the collective bargaining agreement or performed his "normal" supervisory duties. Thus, if the Board's construction of section 8(b)(1)(B) can be sustained, the majority's distinction of the type of work the supervisor performs during the strike would be without justification.

The Board's construction of 8(b)(1)(B), as prohibiting union discipline of supervisors for furthering the interests of their employer during disputes between the union and the employer, rests upon the legislative history of that section, and sections 2(3) and 14(a). The Supreme Court has recognized the fact "that labor legislation is peculiarly the product of legislative compromise of strongly held views, *Local 1976, Carpenters' Union v. Labor*

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[10] Local Union No. 2150, I.B.E.W., 192 NLRB No. 16, slip op. at 5 (1971).

Board, 357 U.S. 93, 99-100, and that legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace [or not embrace] conduct called in question. *National Woodwork Mfrs. Assn. v. N.L.R.B.*, 386 U.S. 612, 619-620."[11] When Congress was considering amendments to the National Labor Relations Act in 1947, it was acutely aware of the fact that unions had previously "taken it upon themselves to say that management should not appoint any representative who [was] too strict with the membership of the union," and through the enactment of section 8(b)(1)(B) it endeavored "to prescribe a remedy in order to prevent such interferences."[12] Although this fact is highly pertinent to an evaluation of the proper scope of section 8(b)(1)(B), other legislative history surrounding the 1947 amendments must also be considered.

Section 8(b)(1)(B) must not be interpreted in a vacuum, but must be interpreted in conjunction with the other 1947 amendments to the N.L.R.A. relating to supervisory personnel.[13] The fact that Congress decided to expressly exclude "supervisors" from the statutory definition of "employee" in section 2(3) is highly informative.

> Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its *intent to make the obligations to the employer paramount.* That provision excepts foremen from the protection

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[11] N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 179 (1967).

[12] 93 CONG. REC. 4266 (1947) (remarks of Sen. Ellender), in II *Legislative History of the Labor Management Relations Act, 1947* at 1077.

[13] *See* sections 2(3), 2(11) and 14(a), 29 U.S.C. §§ 152 (3), 152(11) and 164(a) (1970).

> of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of *ensuring their undivided loyalty, in spite of any union obligations.* See H. Rep. No. 245, 80th Cong., 1st Sess. 14-17 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947); L.A. Young Spring & Wire Corp. v. National Labor Relations Board, 1947, 82 U.S.App.D.C. 327, 163 F.2d 905, certiorari denied 1948, 333 U.S. 837 • • • [14]

In *Meat Cutters* we considered this prior analysis of the 1947 legislative history and concluded that "[a] supervisor's obligations to his union simply cannot detract from the absolute duty, evidenced by section 8(b)(1)(B), which he owes to his employer when exercising his managerial authority." [15]

The majority correctly recognizes that sections 2(3) and 14(a) were expressly enacted to resolve the conflict of loyalties problem resulting from unionization of supervisors. However, it has completely misinterpreted the legislative solution to that problem which Congress enacted in sections 2(3) and 14(a). There is just no support in the language of those sections or in the legislative history for the majority's interpretation that "Congress effectively gave employers an *option*" to prohibit unionization thereby ensuring undivided loyalty, or to permit unionization and thereby accept divided loyalty from their supervisors. What Congress *did* do in sections 2(3) and 14(a) was to solve the conflict of loyalties problem once and for all by taking supervisors completely out of the operation of the Act. Congress provided that there was nothing intended to prevent unionization of supervisors, even in

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[14] Carpenters Dist. Council of Milwaukee v. N.L.R.B., 107 U.S.App.D.C. 55, 57, 274 F.2d 564, 566 (1959) (emphasis added).

[15] Meat Cutters Union Local 81 v. N.L.R.B., 147 U.S.App. D.C. 375, 381, 458 F.2d 794, 800 (1972).

rank-and-file unions, but even if unionized supervisors were to enjoy no protection from the Act. Congress did not give employers the means to *opt* for the undivided loyalty of their supervisors—it guaranteed it itself by enacting sections 2(3) and 14(a).

By the very terms of section 2(3), supervisors, as defined in section 2(11),[16] are excluded from the statutory definition of "employee", and thus taken out of the operation of the Act. This was the legislative solution to the conflict of loyalties problem experienced when supervisors unionized—thereby incurring certain rights under the Act and at the same time being subjected to union influence. Congress concluded that supervisors should be considered to be a part of management, and that the only way to guarantee the undivided loyalty of supervisors to their employer was to take them out of the operation and protection of the Act. Thus, the Senate Report, in noting what major changes the Taft-Hartley Bill would make in the National Labor Relations Act, stated, "It eliminates the genuine supervisor from the coverage of the act as an employee and makes clear that he should be deemed a part of management." S. Rep. No. 105, 80th Cong., 1st Sess. 3 (1947), in I *Legislative History of the Labor Management Relations Act* at 409 [hereinafter cited as *Legis. Hist.*]. Similarly, the House Report noted that

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[16] 29 U.S.C. § 152(11) (1970) provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

"[s]upervisors are management people," and concluded that

> *Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the unions of the rank and file.*

H. R. Rep. No. 245, 80th Cong., 1st Sess. 15-16 (1947), in I *Legis. Hist.* at 306-307 (emphasis in original). The legislative understanding was that even if supervisors organized, they were to be considered "management people" outside the operation of the act.

The explanatory comments of committee members also support this interpretation. Senator Taft explained:

> It is felt very strongly by management that foremen are part of management; that it is impossible to manage a plant unless the foremen are wholly loyal to the management. We tried various inbetween steps, but the general conclusion was that they must either be a part of management or a part of the employees. It was proposed that there be separate foremen's union not affiliated with the men's unions, but it was found that that was almost impossible; that there was always an affiliation of some sort; that foremen, in order to be successful in a strike, must have the support of the employees' union. A plant can promote other men to be foremen if necessary. The tie-up with the employees is inevitable. *The committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States.*

93 Cong. Rec. 3952 (1947), in II *Legis. Hist.* at 1008-1009 (emphasis added). Likewise, Sen. Ball commented:

> The committee took the position that foremen are an essential and integral part of management, and

> that to compel management to bargain with itself, so to speak, by dividing the loyalties of foremen between the union and the employer, simply did not make sense, and inevitably would prove harmful to the free-enterprise system. It might be stated that both the House and Senate bills deal with that subject in substantially the same way.

93 CONG. REC. 5146 (1947), in II *Legis. Hist.* at 1496. *See also,* 93 CONG. REC. A2012-13 (1947) (remarks of Rep. Meade), in I *Legis. Hist.* at 868-69; 93 CONG. REC. 4411 (1947) (remarks of Sen. Smith), in II *Legis. Hist.* at 1148; 93 CONG. REC. 4260 (1947) (remarks of Sen. Ellender), in II *Legis. Hist.* 1064-65.

The majority finds its option argument in the language and legislative history of section 14(a). Of course, the legislative history of that section is intimately bound up in that of section 2(3), and cannot be looked at separately.[17] The legislative history clearly indicates that section 14(a) was intended to do nothing more than make clear that an employer could not be compelled to treat his supervisors like other statutory "employees," even if they remained in the union. This follows directly from the exclusion of supervisors from the definition of "employee" in section 2(3). There is just nothing in the legislative history to indicate that Congress assumed that if an employer permitted his supervisors to remain in the union, he thereby impliedly accepted their dual loyalty.

What *is* eminently lucid from the legislative history is that Congress thought it was providing that even if a supervisor remained in a union, he had no protection or coverage under the act, and had to rely solely on the be-

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[17] *See, e.g.*, S. REP. No. 105, 80th Cong., 1st Sess. 5 (1947), in I *Legis. Hist.* at 411; Meat Cutters Local Union No. 81 v. N.L.R.B., 147 U.S.App.D.C. 375, 380-81, 458 F.2d 794, 799-800 (1972).

nevolence of his employer. Thus, the House Report states, "The bill does not forbid these people [*i.e.*, supervisors] to organize. It merely leaves their organizing and bargaining activities outside the provisions of the act." H.R. REP. No. 245, 80th Cong., 1st Sess. 23 (1947), in I *Legis. Hist.* at 314. *See also*, S. REP. No. 105, 80th Cong., 1st Sess. 5 (1947), in I *Legis. Hist.* at 411; S. MIN. REP. No. 105, pt. 2, 80th Cong., 1st Sess. 39 (1947), in I *Legis. Hist.* at 501. Again, the remarks of the committee are informative. For example, Rep. Hartley noted, "This bill also exempts supervisors from the compulsory features of the National Labor Relations Act. In other words, this bill does not bar them from organizing but they cannot obtain the benefits of the act." 93 CONG. REC. 3533 (1947), in I *Legis. Hist.* at 613. *See also*, 93 CONG. REC. 3952 (1947) (remarks of Sen. Taft), in II *Legis Hist.* at 1008.

The fact that section 14(a) also provides that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization" does not in any way support the majority's option argument. This statement was *not* intended "to expressly provide that foremen could unionize" at the employer's will, as the majority argues, for there was nothing in the 1947 Amendments which would have prevented such unionization.[18] The statement was without material effect, and "was included presumably out of an abundance of caution." H. CONF. REP. No. 510, 80th Cong., 1st Sess.

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[18] S. REP. No. 105, 80th Cong., 1st Sess. 28 (1947), in I *Legis. Hist.* at 434 states, "Section 14: This is a new section which *makes it clear* that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for other Federal or State agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity" (emphasis added).

60 (1947), in I *Legis. Hist.* at 564.[19] This almost superfluous provision obviously cannot legitimately serve as a cornerstone for any interpretation of the legislative solution to the conflict of loyalties problem enacted by the 80th Congress.

The majority maintains that the case law has always assumed that once an employer permits his supervisors to join unions, he can no longer claim their undivided loyalty in disputes with the union. Yet the cases it cites for this proposition all pre-date the Board's decision in *Oakland Mailers,* wherein the Board faced the issue of union discipline of supervisors for the first time and admittedly expanded the interpretation of section 8(b)(1)(B).[20] The cases since *Oakland Mailers* indicate that merely because an employer may have consented to the compulsory union membership of his supervisors under a union-security provision does not negate his right to the full protection of section 8(b)(1)(B). *See Meat Cutters Union Local 81 v. N.L.R.B.,* 147 U.S.App.D.C. 375, 458 F.2d 794 (1972); *Toledo Locals Nos. 15-P and 272,* 175 NLRB 1072, 1080 (1969), *enfd.,* 437 F.2d 55 (6th Cir. 1971); *Local Union No. 2150, I.B.E.W.,* 192 NLRB No. 16, slip op. at 5 (1971). And in *Meat Cutters* we specifically rejected the union's argument that section 14(a) expressed an intent to subject supervisor/members to the full control of the union,

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[19] The legislative history contains a number of references to the fact that there was no intent to prevent unionization of supervisors, but merely to take them out of the operation of the Act—thus leaving them only with self-help protections. *See* pp. 66-67, *supra.*

[20] The Board informed us at oral argument, and my own research has not contradicted their assertion, that *Oakland Mailers* was the first case in which it faced the issue of the extent to which section 8(b)(1)(B) prevents union discipline of supervisors/members for performing managerial duties.

concluding that it is readily apparent "when all the relevant 1947 amendments to the Act are considered in concert, that Congress did not intend thereby to allow unions to subvert the 'undivided loyalty' it clearly believed such managerial personnel owe to their respective employers." [21]

In my view the Board's interpretation of section 8(b)(1)(B) as proscribing union discipline of supervisors for furthering the interests of their employer by performing struck work expressly at his request does not stretch that section to the breaking point, but is fully justified in light of the legislative history and the other sections dealing with supervisors.

III.

The majority attempts to draw significant support for its construction of section 8(b)(1)(B) from *Allis-Chalmers*,[22] which it characterizes as "indistinguishable from these cases." It is my view that a close analysis of *Allis-Chalmers* and *Scofield* [23] reveals nothing which would relieve the unions from responsibility under section 8(b)(1)(B) for these fines. First, it is vitally important to remember that *Allis-Chalmers* involved section 8(b)(1)(A),[24] not 8(b)(1)(B).[25] While both contain the common

[21] 147 U.S.App.D.C. at 381, 458 F.2d at 800.

[22] 388 U.S. 175 (1967).

[23] 394 U.S. 423 (1969).

[24] 29 U.S.C. § 158(b)(1)(A) (1970) provides:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

[25] *See* note 1, *supra*.

language "to restrain or coerce," the two provisions protect completely different interests in quite different ways. Section 8(b)(1)(A) was only intended to impose some slight controls upon the union-*employee* relationship, and the legislative history makes clear that Congress did not intend extensive regulation of the *internal* union-employee/member relationship. *See N.L.R.B. v. The Boeing Co.*, 41 U.S.L.W. 4678, 4679 (U.S. May 21, 1973); *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 183-195 (1967). *See also, National Maritime Union*, 78 NLRB 971, 982-87 (1948), *enfd.* 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950). Section 8(b)(1)(B), on the other hand, was intended to regulate the *external* union-*employer* relationship. No amount of union coercion or interference with an employer's selection or control of his representatives for the purpose of collective bargaining or adjustment of grievances was permitted.

Second, in upholding the union fines in *Allis-Chalmers* and *Scofield*, while the Supreme Court did not rely upon the express language of the proviso to section 8(b)(1)(A),[26] as the Labor Board had originally done in *Minneapolis Star and Tribune Co.*, 109 NLRB 727 (1954), it did draw "cogent support" for its decision from it.[27] *See N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191-92 (1967); *Scofield v. N.L.R.B.*, 394 U.S. 423, 428 (1969). *See also, Gould, Some Limitations Upon Union Discipline Under the National Labor Relations Act; The Radations of Allis-Chalmers*, 1970 DUKE L. J. 1067, 1128 (1970). The applicability of that proviso, however, is clearly limited

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[26] *See* note 24, *supra*.

[27] *Compare* Booster Lodge No. 405, Int. Assn. of Machinists v. N.L.R.B., 148 U.S.App.D.C. 119, 125, 459 F.2d 1143, 1149 (1972), *aff'd in part*, 41 *U.S.L.W.* 4683 (U.S. May 21, 1973) *with* Meat Cutters Union Local 21 v. N.L.R.B., 147 U.S.App.D.C. 375, 381, 458 F.2d 794, 800 (1972).

to section 8(b)(1)(A). It is not a part of section 8(b)(1)(B), which directly regulates only the union-employer relationship.[25] Therefore, to the extent that *Allis-Chalmers* and *Scofield* draw "cogent support" from that proviso for their holdings, that rationale cannot lend support to disciplining "supervisors" where the cases arise under section 8(b)(1)(B).

In the majority's view the "one thing that is clear" from *Allis-Chalmers* is that there is no overriding policy of the labor laws which prohibits reasonable union fines levied against its members who cross a lawful picket line to perform rank-and-file struck work. A union has a right to assure solidarity in its ranks by imposing fines to prevent strike breaking by its members. This reasoning, the majority argues, is directly applicable to the situation here. The defect in this argument is that it fails to recognize the fundamental distinction which Congress made between *employees* and *supervisors*, even if the latter were members of a union. In *Allis-Chalmers* the Court was faced only with the situation of union discipline of *employee/* members. Thus, the Court there began by noting that

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. . . . The employee may disagree with many of the union decisions but is bound by them. "The majority rule concept is

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[25] *See* San Francisco-Oakland Mailers' Union No. 18, International Typographical Union, 172 NLRB 2173 (1968); Price v. N.L.R.B., 373 F.2d 443, 446 (9th Cir. 1967), *cert. denied*, 392 U.S. 904 (1968); Meat Cutters Union Local 81 v. N.L.R.B., 147 U.S.App.D.C. 375, 381-82, 458 F.2d 794, 800-801 (1972). *See also* II *Legis. Hist.* at 1139, 1141, and 1200.

today unquestionably at the center of our federal labor policy." [29]

It was in this context that the Court proceeded to acknowledge the importance of a union's power to discipline its members to protect against erosion of its status. "The power to fine or expel a strike breaker 'is essential if the union is to be an effective bargaining agent.'" [30]

In contrast, in the instant cases we are confronted with union discipline of *supervisor* members, which Congress said in the Taft-Hartley amendments were to be "deemed a part of management." [31] It was largely for the reason that because a usual union member *is* subservient to the will of the majority, Congress took supervisors out of the operation of the Act—to make them subservient to the will of the employer and *not* the union.[32] Certainly management has an equal right under our federal labor policy to promote strike solidarity among its supervisory personnel as does a union to promote solidarity from its members.[33] Where these two rights clash, as they do here,

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[29] 388 U.S. at 180 (footnote omitted).

[30] N.L.R.B. v. Marine Workers, 391 U.S. 418, 423 (1968) quoting from N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967).

[31] S. REP. No. 105, 80th Cong., 1st Sess. 3 (1947), in I *Legis. Hist.* at 409.

[32] *See* majority opinion at 37, *supra*.

[33] The Senate Report indicates that in exempting supervisors from the operation of the Act, Congress was concerned about restoring some semblance of a balance of collective bargaining power between unions and employers. The Report found that the organization of supervisors with the resulting rights under the National Labor Relations Act "probably more than any other single factor ha[d] upset any real balance of power in the collecting-bargaining process . . . ." S. REP. No. 105, 80th Cong., 1st Sess. 3 (1947), in I *Legis. Hist.* at 409.

the legislative pronouncements of sections 2(3), 14(a) and 8(b)(1)(B) indicate to me that the interest of the employer in having loyal supervisors under his control must prevail.

Further, as the majority acknowledges, Supreme Court decisions subsequent to *Allis-Chalmers* have emphasized that the *Allis-Chalmers* rationale only permits "a union • • • to enforce a properly adopted rule which reflects a legitimate union interest [and] *impairs no policy Congress has imbedded in the labor laws.*" *Scofield v. N.L.R.B.* 394 U.S. 423, 430 (1969) (emphasis added), *and see* 394 U.S. at 429, 432. *See N.L.R.B. v. The Boeing Co.*, 41 U.S.L.W. 4678, 4679 (U.S. May 21, 1973), *N.L.R.B. v. Marine Workers*, 391 U.S. 418 (1968); *Booster Lodge No. 405, Int. Assn. of Machinists v. N.L.R.B.*, 148 U.S.App.D.C. 119, 126, 459 F.2d 1143, 1150 (1972), *aff'd in part*, 41 U.S.L.W. 4683 (U.S. May 21, 1973).[34] And, as previously developed, sections 2(3), 14(a) and 8(b)(1)(B) do embody such a congressional policy—to ensure the undivided loyalty of supervisors to their employer without interference from unions—which would be impaired by these disciplinary fines. Whenever union action has the effect of impermissibly inhibiting an employer with respect to his choice of loyal representatives it is apparent that an express federal labor policy is being violated, and it necessarily follows that the rationale underlying *Allis-Chalmers* and *Scofield* cannot be availed to nullify the section 8(b)(1)(B) violation.

[34] *See also*, N.L.R.B. v. International Molders and Allied Workers Union, 442 F.2d 92, 94 (7th Cir. 1971).

APPENDIX B

193 NLRB No. 7

D—5456
Naples-Fort Meyers, Lake City, Broward County, Sarasota-Bradenton, and Palatka Areas, Fla.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
SYSTEM COUNCIL U-4, and the
Following Affiliates thereof:

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL UNION NO. 641

and Case 12-CB-1109-2

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL UNION NO. 622

and Case 12-CB-1116

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL UNION NO. 759

and Case 12-CB-1117

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL UNION NO. 820

and Case 12-CB-1118

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL UNION NO. 1263

and Case 12-CB-1119

FLORIDA POWER & LIGHT
COMPANY

193 NLRB No. 7

DECISION AND ORDER

Upon charges duly filed, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12, issued a consolidated complaint and notice of hearing, dated July 24, 1970, against International Brotherhood of Electrical Workers System Council U-4 and certain of its affiliated local unions, to wit: International Brotherhood of Electrical Workers Local Union Nos. 641, 622, 759, 820, and 1263. The complaint alleged that the Respondents had engaged in and were engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(B) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges, order consolidating cases, and complaint and notice of hearing were duly served upon the parties. On August 13, 1970, Respondents filed their answer to the complaint denying commission of unfair labor practices and requesting that the complaint be dismissed.

Thereafter, the parties entered into a stipulation of facts and the issue and jointly moved to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and order. The parties stipulated that they waived a hearing before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's Decision, and that no oral testimony was necessary or desired by any of the parties. The parties also agreed that the charges, consolidated complaint, amendment to the consolidated complaint, and the stipulation constitute the entire record in this proceeding.

On December 3, 1970, the Board issued its order granting motion, approving stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel, Respondents, and the Charging Party filed briefs in support of their positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel.

The Board has considered the stipulation, including exhibits, the briefs, and the entire record in this proceeding, and hereby makes the following:

Findings of Fact

I. The Business of the Employer

Florida Power & Light Company is a Florida corporate utility, with offices and facilities located at various places within the State of Florida, where it is engaged in

the production of electricity. During the 12 months preceding the complaint, Florida Power & Light Company, in the course and conduct of its operations, received gross revenues in excess of $500,000, and purchased and received goods and materials valued in excess of $50,000 directly from points outside the State of Florida.

The parties have stipulated, and we find, that Florida Power & Light Company is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We find that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. The Labor Organizations Involved

The parties have stipulated, and we find, that Respondents are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

Respondent System Council U-4 is an unincorporated association of 11 local unions of the International Brotherhood of Electrical Workers (including those named as Respondents in this proceeding) whose members work for Florida Power & Light Company, and is an admitted agent of the Respondent Local Unions authorized to deal with Florida Power & Light Company in all matters pertaining to collective bargaining. From October 22, 1969, through December 28, 1969, Respondents were engaged in an economic strike against Florida Power & Light Company and Respondent Local Unions maintained picket lines at nearly all the Company's operational facilities. The Company's supervisors routinely crossed the picket line during the

course of the strike and performed work, including unit work, for the Company. Following the strike, in January, February, and March 1970, the Respondent Locals, with the knowledge of System Council U-4, notified the supervisors within their respective jurisdictions that charges had been filed against them for violations of the International constitution and of a Trial Board hearing date. Thereafter, various supervisors were fined in amounts ranging up to $6,000 and/or expelled from the Union and their membership in the IBEW System Council U-4 Death Benefit Fund, Inc., a nonprofit corporation open only to members in good standing of the Respondent Local Unions, was canceled as a result of the actions of the Respondents, As a further result of Respondents' actions the supervisors in question are not eligible, under the terms of the International constitution, to apply for union pension benefits. The parties have stipulated that the supervisors were supervisors within the meaning of Section 2(11) of the Act and that they possessed authority on behalf of Florida Power & Light to adjust grievances and to act as its representatives in matters involving collective-bargaining interpretations, although three of them supervised and adjusted grievances of nonbargaining unit employees only.

The parties have stipulated that the issue to be decided by the Board is whether or not the Respondents' disciplining of certain of the Company's supervisors (see Appendix A) and causing System Council U-4 to terminate their death benefit coverage violated Section 8(b)(1)(B) of the Act.[1]

[1]The Company's request to amend the complaint to allege additional violations of Section 8(b)(1)(B) and violation of Section 8(b)(2) is denied, since the parties have stipulated to the scope of the issue and there can thus be no implication that the Respondents have consented to the trial of other isues.

Respondents assert in their brief that this proceeding presents the same issues before the Board in Wisconsin Electric Power Company and Illinois Bell Telephone Company. Those issues have since been decided (192 NLRB Nos. 16 and 17) with a majority of the Board (Member Fanning dissenting) holding that a union violates Section 8(b)(1)(B) of the Act by fining supervisors for performing struck work (i.e., action taken in the employer's interest in the course of their jobs). The Board found that the fines there struck at the loyalty an employer should be able to expect from its representatives for the adjustment of grievances and therefore restrained and coerced employers in their selection of such representatives. We reach the same conclusion here. Nor are we persuaded to a different result by the Respondents 'argument based on the parties' stipulation that union membership was voluntary and not influenced by either the Company or the Unions. The Company's acquiescence to retention of union membership by its supervisors and grievance representatives is not evidence that it is not coerced or restrained by union discipline against them for their actions on its behalf, and previously we have found such discipline unlawful even though union membership was required by the collective-bargaining agreement. E.g., Illinois Bell Telephone Company, supra. We also find no merit in Respondents' contention that no violation may be found as to those supervisors who do not adjust the grievances of, or supervise, bargaining unit employees. The degree of coercion or restraint of an employer is scarcely less because the disciplined union member has no official role to play in the relations between the union and the employer, and we have found violations in the past where there was no bargaining relationship at all between the employer and the respondent union. A. S. Horner, Inc., 177 NLRB No. 76; 176 NLRB No. 105.

We find that the Respondent Local Unions severally violated Section 8(b)(1)(B) of the Act by trying, fining and/or expelling or suspending from union membership for performing struck work, certain supervisors, as detailed in Appendix A, and by causing System Council U-4 Death Benefit Fund, Inc., to terminate death benefit coverage for certain supervisors who were so disciplined.

As to System Council U-4 we shall dismiss the complaint in its entirety. The record demonstrates only that the System Council exists for the purpose of conducting collective-bargaining negotiations with Florida Power & Light on behalf of its member Local Unions and that it is their agent for this purpose. There is no evidence that System Council U-4 participated in, or ratified, the activities of the Local Unions which we have found unlawful, nor that it plays any role in intraunion disciplinary proceedings—only that it had knowledge of the actions of the other Respondents. We are not aware of any rule of law which would render an agent liable for the actions of its principals in such circumstances.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The conduct of the Respondents set forth above, occurring in connection with the operations of the Employer as set forth in section I, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent Local Unions have engaged in certain unfair labor practices we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act, including, as appropriate: (1) rescission of all fines and refund of any money paid to the Union as a result thereof; (2) expunging all record of the proceedings in this matter against the Employer's representatives; (3) restoration to membership and all consequent rights of the Employer's representatives, whom we have found to be unlawfully disciplined; (4) notifying the Employer's representatives and the applicable benefit plans, including System Council U-4 Death Benefit Fund, Inc., that they are in good standing and are eligible to participate; (5) notifying the Employer's representatives that all rights and benefits to which they were entitled before the unlawful action taken against them, including union membership, have been restored; (6) posting the notices attached to the Decision as appendixes.

Conclusions of Law

1. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondents are labor organizations within the meaning of Section 2(5) of the Act.

3. International Brotherhood of Electrical Workers System Council U-4 did not violate Section 8(b)(1)(B) of the Act.

4. Those individuals listed in Appendix A have, at all material times, been representatives of the Employer selected by it, inter alia, for the purpose of dealing with matters involving collective-bargaining interpretation and adjusting grievances within the meaning of Section 8(b)(1)(B) of the Act.

5. By disciplining the Employer's representatives referred to in paragraph 4 for performing struck work, including trying, fining, and/or expelling or suspending them, and/or causing System Council U-4 Death Benefit Fund, Inc., to terminate their coverage, Respondent Local Unions coerced and restrained the Employer in the selection of its representatives for the purposes of collective bargaining and the adjustment of grievances, and thereby have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. The complaint be, an it hereby is, dismissed in so far as it alleges violations of the Act by International Brotherhood of Electrical Workers System Council U-4.

B. Respondents International Brotherhood of Electrical Workers Local Union Nos. 641, 622, 759, 820, and 1263, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing Florida Power & Light Company, or any other employer, in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances by trying or disciplining such representatives because they have performed struck work for their employer.

(b) In any like or related manner restraining or coercing Florida Power & Light Company or any other employer in the selection of its representatives for the purposes of collective bargaining or adjusting grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Expunge all record of the disciplinary proceedings and actions taken against those individuals named in Appendix A to this Decision because they performed struck work during the 1969 strike against Florida Power & Light Company.

(b) Rescind all fines levied, as detailed in Appendix A to this Decision, for performing struck work for Florida Power & Light Company during the 1969 strike and refund to those individuals any money paid to Respondents as a result of such fines.

(c) Restore membership, and all consequent rights, to those individuals named in the applicable part of Appendix A to this Decision, who were unlawfully expelled or suspended.

(d) Notify, in writing, System Control U-4 Death Benefit Fund, Inc., any other benefit plan affected by the discipline found unlawful herein, and those individuals listed in the applicable part of Appendix A to this Decision whose coverage the respective Respondents caused to be terminated, that they are in good standing and are eligible for coverage in the same manner as before Respondents' imposed such discipline.

(e) Notify, in writing, those individuals listed in the applicable part of Appendix A to this Decision that all rights and benefits, including union membership, to which they were entitled before the disciplinary action, found to be unlawful herein, was taken against them, have been restored and that any fines have been rescinded and all applicable records expunged.

(f) Post at their business offices and meeting halls copies of the attached notice marked "Appendix B, C, D, E, and F"[2] as appropriate. Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by the appropriate Union's representative, shall be posted by each Respondent Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by each Respondent Union

[2]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

to insure that said notices are not altered, defaced, or covered by any other material.

(g) Mail to the Regional Director for Region 12 signed copies of said notices for posting by Florida Power & Light Company, if willing, in places where notices to employees are customarily posted. Copies of said notices, to be furnished by the Regional Director for Region 12, shall, after being duly signed by the respective Respondent Union's official representative, be forthwith returned to the Regional Director.

(h) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, Washington, D.C. Sep 2 1971

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER FANNING, dissenting:

My colleagues have found that the Respondent Local Unions here violated Section 8(b)(1)(B) of the Act by coercing and restraining the Employer in the selection of its representatives for the purposes of collective bargaining

and adjusting grievances. I disagree and, for the reasons set forth in my dissenting opinion in Illinois Bell Telephone Company, 192 NLRB No. 17, would dismiss the complaint in its entirety.

Dated, Washington, D.C. Sep 2 1971

John H. Fanning, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A OF APPENDIX B

The parties have stipulated that the Respondent International Brotherhood of Electrical Workers Local Unions tried, and imposed discipline on, certain named individuals who were selected by the Employer for the purpose of acting as its representatives in matters concerning collective-bargaining interpretations and adjusting grievances, including causing them to lose their right to participate in System Council U-4 Death Benefit Fund, Inc. (except as noted by an asterisk), because they performed struck work for the Employer, as follows:

No. 641:

H. E. Weatherly*	fined	$6,000	set aside on appeal
M. R. Weeks*	"	$6,000	no appeal
C. E. Baker*	"	$6,000	" "
Dan Bigelow*	"	$6,000	" "

No. 820

R. T. Horne	fined $6,000 reduced to $5,500	no appeal
O. M. Brannon	fined $500 reduced to $100	" "
F. D. Fishel	fined $6,000 reduced to $500	" "
T. R. Brandewie	fined $6,000	" "
E. W. Jones	fined $500 reduced to $100	" "
C. A. Norris	fined $500 reduced to $100	" "
C. A. Pearsall	fined $500 reduced to $100	" "
J. E. Bryan	fined $500 reduced to $100	appeal denied
H. D. Stephens	fined $500	" "

No. 622:

C. J. Rutledge	fined $1,500 suspended for 3 years	reduced to $100 and suspension set aside on appeal

No. 759:

Richard Ackerman	fined $1,000 expelled	no appeal

Ernest Beasley, Jr.	fined $1,000 expelled	" "
Fred Davis	fined $1,000	" "
Joseph L. Helmich	fined $1,000 expelled	" "
Frank Henderson	fined $1,000 expelled	" "
R. P. Norman	fined $1,000 expelled	" "
S. V. Wanklyn	fined $1,000 expelled	" "
C. W. Bingham	fined $1,000 expelled	no appeal
E. F. Borchardt	fined $1,000 expelled	" "
William Cole	fined $1,000 expelled	" "
J. T. Hardy, Jr.	fined $1,000 expelled	" "
C. E. Stout, Jr.	fined $1,000 expelled	" "
Frank Ludlow	fined $1,000 expelled	" "
P. Den Bleyker	fined $1,000 expelled	" "
Earl Guyaux	fined $1,000 expelled	no appeal

T. D. Burkett	fined $1,000 expelled	" "
W. B. Hoffman	fined $1,000 expelled	appeal denied
L. E. Jones	fined $1,000 expelled	no appeal
R. W. LaRoche	fined $1,000 expelled	appeal denied
L. H. Grubbs	fined $1,000 expelled	no appeal
H. E. Hardee	fined $1,000 expelled	" "
Stanley Hutcheson	fined $1,000 expelled	" "
Charles Pogel	fined $1,000 expelled	" "
T. W. Norton	fined $1,000 expelled	" "
Claude Overfelt	fined $1,000 expelled	" "
R. O. Stamps	fined $1,000 expelled	" "
J. E. McLeod	fined $1,000 expelled	" "
W. H. McNary	fined $1,000 expelled	reduced to $200 on appeal appeal denied

H. L. Orton	fined $1,000 expelled	no appeal
Robert Rogers	fined $1,000 expelled	" "
H. V. Johnson	fined $1,000 expelled	no appeal
Emil Piazzo	fined $1,000 expelled	" "
Fred Shaver	fined $1,000 expelled	" "
W. M. Smith	fined $1,000 expelled	" "
V. J. Nicholas	fined $1,000 expelled	reduced to $500 on appeal appeal denied—paid fine
P. T. McAllister	fined $1,000 expelled	no appeal
W. L. Roper	fined $1,000 expelled	reduced to $400 on appeal appeal denied
A. D. Reed	fined $1,000 expelled	reduced to $200 on appeal appeal denied—paid fine
Everett Weeks	fined $1,000 expelled	no appeal
No. 1263:		
William S. Doughty	expelled	no appeal

APPENDIX B OF APPENDIX B

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT try, fine, or cause to lose their right to benefits to which they would otherwise be entitled, representatives selected by Florida Power & Light Company, or any other employer, for the purpose of collective bargaining or adjusting grievances, because they performed struck work for their employer.

WE WILL NOT in any like or related manner coerce or restrain Florida Power & Light Company, or any other employer, in the selection of its representatives for the purpose of collective bargaining or adjusting grievances.

WE WILL expunge all record of the disciplinary proceedings and actions taken against Florida Power & Light Company's representatives for the purposes of collective bargaining or adjusting grievances because they performed struck work during the 1969 strike.

WE WILL rescind all fines levied against such representatives because they performed struck work during the 1969 strike and refund to them any money they have paid us as a result of such fines.

WE WILL notify any benefit plan to which their rights were affected by our disciplinary actions, and those individuals affected, that they are in good standing and

are eligible for coverage in the same manner as before our disciplinary actions.

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL UNION NO. 641

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 706, 500 Zack Street, Tampa, Florida 33602, Telephone 813-228-7711, extension 227.

APPENDIX C OF APPENDIX B

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT try, fine, suspend from union membership, or cause to lose their right to benefits to which they

would otherwise be entitled, including coverage by System Council U-4 Death Benefit Fund, Inc., representatives selected by Florida Power & Light Company, or any other employer, for the purpose of collective bargaining or adjusting grievances, because they performed struck work for their employer.

WE WILL NOT in any like or related manner coerce or restrain Florida Power & Light Company, or any other employer, in the selection of its representatives for the purpose of collective bargaining or adjusting grievances.

WE WILL expunge all record of the disciplinary proceedings and actions taken against Florida Power & Light Company's representatives for the purposes of collective bargaining or adjusting grievances because they performed struck work during the 1969 strike.

WE WILL rescind all fines levied against such representatives because they performed struck work during the 1969 strike and refund to them any money they have paid us as a result of such fines.

WE WILL restore to membership, and all rights that that entitles them to, such representatives whom we have suspended from union membership.

WE WILL notify System Council U-4 Death Benefit Fund, Inc., any other benefit plan to which their rights were affected by our disciplinary actions, and those individuals affected, that they are in good standing and are eligible for coverage in the same manner as before our disciplinary actions.

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL UNION NO. 622

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 706, 500 Zack Street, Tampa, Florida 33602, Telephone 813-228-7711, extension 227.

APPENDIX D OF APPENDIX B

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT try, fine, expel from union membership, or cause to lose their right to benefits to which they would otherwise be entitled, including coverage by System Council U-4 Death Benefit Fund, Inc., representatives selected by Florida Power & Light Company, or any other employer, for the purpose of collective bargaining or ad-

justing grievances, because they performed struck work for their employer.

WE WILL NOT in any like or related manner coerce or restrain Florida Power & Light Company, or any other employer, in the selection of its representatives for the purpose of collective bargaining or adjusting grievances.

WE WILL expunge all record of the disciplinary proceedings and actions taken against Florida Power & Light Company's representatives for the purposes of collective bargaining or adjusting grievances because they performed struck work during the 1969 strike.

WE WILL rescind all fines levied against such representatives because they performed struck work during the 1969 strike and refund to them any money they have paid us as a result of such fines.

WE WILL restore to membership, and all rights that that entitles them to, such representatives whom we have expelled from union membership.

WE WILL notify System Council U-4 Death Benefit Fund, Inc., any other benefit plan to which their rights were affected by our disciplinary actions, and those individuals affected, that they are in good standing and are eligible for coverage in the same manner as before our disciplinary actions.

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL UNION NO. 759

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 706, 500 Zack Street, Tampa, Florida 33602, Telephone 813-228-7711, extension 227.

APPENDIX E OF APPENDIX B

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT try, fine, or cause to lose their right to benefits to which they would otherwise be entitled, including coverage by System Council U-4 Death Benefit Fund, Inc., representatives selected by Florida Power & Light Company, or any other employer, for the purpose of collective bargaining or adjusting grievances, because they performed struck work for their employer.

WE WILL NOT in any like or related manner coerce or restrain Florida Power & Light Company, or any other

employer, in the selection of its representatives for the purpose of collective bargaining or adjusting grievances.

WE WILL expunge all record of the disciplinary proceedings and actions taken against Florida Power & Light Company's representatives for the purposes of collective bargaining or adjusting grievances because they performed struck work during the 1969 strike.

WE WILL rescind all fines levied against such representatives because they performed struck work during the 1969 strike and refund to them any money they have paid us as a result of such fines.

WE WILL notify System Council U-4 Death Benefit Fund, Inc., any other benefit plan to which their rights were affected, that they are in good standing and are eligible for coverage in the same manner as before our disciplinary actions.

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL UNION NO. 820

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 706, 500 Zack Street, Tampa, Florida 33602, Telephone 813-228-7711, extension 227.

APPENDIX F OF APPENDIX B

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT try, expel from union membership, or cause to lose their right to benefits to which they would otherwise be entitled, including coverage by System Council U-4 Death Benefit Fund, Inc., representatives selected by Florida Power & Light Company, or any other employer, for the purpose of collective bargaining or adjusting grievances, because they performed struck work for their employer.

WE WILL NOT in any like or related manner coerce or restrain Florida Power & Light Company, or any other employer, in the selection of its representatives for the purpose of collective bargaining or adjusting grievances.

WE WILL expunge all record of the disciplinary proceedings and actions taken against Florida Power & Light Company's representatives for the purposes of collective bargaining or adjusting grievances because they performed struck work during the 1969 strike.

WE WILL restore to membership, and all rights that that entitled them to, such representatives whom we have expelled from Union membership.

WE WILL notify System Council U-4 Death Benefit Fund, Inc., any other benefit plan to which their rights were affected, that they are in good standing and are eligible for coverage in the same manner as before our disciplinary actions.

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL UNIÓN NO. 1263

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 706, 500 Zack Street, Tampa, Florida 33602, Telephone 813-228-7711, extension 227.

APPENDIX C

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.).

Section 2. When used in this Act —

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such

authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * *

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * *

Section 8(b). It shall be an unfair labor practice for a labor organization or its agent —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

In the United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 71-1864

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

and

WISCONSIN ELECTRIC POWER COMPANY, *Intervenor,*

v.

LOCAL 2150, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *Respondent.*

On Application for Enforcement of an Order of the National Labor Relations Board.

ARGUED NOVEMBER 29, 1972 — DECIDED JULY 13, 1973

Before KILEY and CUMMINGS, *Circuit Judges,* and ESCHBACH, *District Judge.*[1]

CUMMINGS, *Circuit Judge.* The National Labor Relations Board found that the Union[2] violated Section 8(b)(1)(B) of the National Labor Relations Act by disciplining certain company supervisors for performing bargaining unit

[1] District Judge Jesse E. Eschbach of the Northern District of Indiana is sitting by designation.

[2] Local 2150, International Brotherhood of Electrical Workers, AFL-CIO.

work during the Union's economic strike. This case arises on the Board's application for enforcement of its order issued pursuant to that finding. The Board's decision and order are reported at 192 NLRB No. 16.

Since the 1930's the Company and the Union have enjoyed a collective bargaining relationship. When their then current two-year contract expired on June 16, 1969, the Union initiated an economic strike which continued until July 1, 1969. During the strike all the Company's supervisors in the categories of those disciplined save one, who was hospitalized at the time, reported for work. The record contains no suggestion that the Company gave the supervisors an option to choose not to cross the picket line.[3] Following the strike the Union preferred charges against 60 supervisors (including the hospitalized one) for doing struck work.[4] All but two of these were holders of union withdrawal cards. A withdrawal card entitles the holder to a very qualified union membership as explained below. After a trial at which none of the charged supervisors appeared, the Union found all guilty except for the hospitalized supervisor and one of the two who did not possess a withdrawal card. The other supervisor not retaining a withdrawal card had his discipline nullified upon appeal to the International Union. The Union imposed on each guilty supervisor a $100 fine and a year's suspension. This sentence was to be suspended on condition that the supervisors were not found guilty of a similar

[3] Although at oral argument before the Board company counsel asserted that the Company had instructed the supervisors to report for work and this is uncontroverted, as the Board noted, that is not explicit in the record. However, unless the Company expressly gave the supervisors an option as to whether to cross the picket lines or not, the Board's case would not be vulnerable. It is such an option which could present a problem in that if the Company left to the supervisors' discretion the decision whether to allign themselves with management or with the Union, arguably it might be difficult for the Company legitimately to complain about the Union's compromising the loyalty of these representatives. But see *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, ... F.2d ...., ..., (D.C. Cir. 1972) Slip Op. at 21. (It has aslo been suggested that whether the supervisors were performing a properly supervisory function might be more debatable. See *id.*, ... F.2d at ...., Slip. Op. at 47.) But this record contains not the slightest hint of the Company's giving such an option and, even if there were no direct order, is only reasonably consistent with the Company's expectation that the supervisors would report for work.

[4] The complaint originally involved 61 persons, but the 61st, a safety specialist, was found to be not clearly a statutory supervisor and not to be an employer representative within the coverage of Section 8(b)(1)(B).

offense for a period of two years, which period extended beyond the expiration of the new collective bargaining agreement.

None of the supervisors here involved were members of the bargaining unit, and the Union did not represent them in bargaining with the Company. Nevertheless, the collective bargaining agreement in force prior to the strike provided that upon an employee's promotion to a supervisory position the Union would give him a withdrawal card if he so requested. Union withdrawal cards are either of the honorary or participating type. Some supervisors involved here held the former; others the latter. Both types carry an exemption for the holder from the dues obligation to the Union and entitle the holder to regain regular membership without fulfilling normal reinstatement requirements. In addition, the holder of the participating withdrawal card is entitled to participate in the pension and insurance benefits of the Union's International Affiliate upon the payment of certain fees. Withdrawal card-holders are denied all other benefits of membership including even the right to attend union meetings, but are subject to the Union's constitution.

The Board agreed with the Trial Examiner that all 60 of the concededly statutory supervisors[5] possessed the authority to adjust grievances and were representatives of the Employer within the meaning of Section 8(b)(1)(B). The Union does not contest this finding. With Member Fanning dissenting, a three-member majority of the Board panel concluded that the Union violated Section 8(b)(1)(B) when it disciplined the supervisors for crossing the picket line and performing struck work. Relying on the general principles of law defining the thrust of Section 8(b)(1)(B) as enunciated in *Lithographers Locals 15-P and 272 (The Toledo Blade Co., Inc.)*, 175 NLRB 1072, 1080, enforced, 437 F.2d 55 (6th Cir. 1971), which principles the Board found long settled in its decisions and the courts', the Board reasoned:

> "Here the supervisors, by doing struck work, as directed, by the Employer, were furthering the inter-

[5] See Section 2(11) of the Act (29 U.S.C. § 152(11)) for the statutory definition of "supervisor."

ests of the Employer in a dispute not between the Union and the supervisor-union members but between the Employer and the Union. During the strike of the Union, the Employer clearly considered its supervisors among those it could depend on during this period. The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances. Moreover, such fines clearly interfere with the Employer's control over its own representatives.

"Of course, our decision is not meant to imply that a union is completely precluded from disciplining supervisor-union members. It only means that when the underlying dispute is between the employer and the union rather than between the union and the supervisor, then the union is precluded in taking disciplinary action by Section 8(b)(1)(B). The intent is to prevent the supervisor from being placed in a position where he must decide either to support his employer and thereby risk internal union discipline or support the union and thereby jeopardize his position with the employer. To place the supervisor in such a position casts doubt both upon his loyalty to his employer and upon his effectiveness as the employer's collective-bargaining and grievance adjustment representative. The purpose of Section 8(b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer.

Accordingly, we find that Section 8(b)(1)(B) has been violated."[5]

Section 8(b)(1)(B) of the Labor-Management Relations Act (29 U.S.C. § 158 (b)(1)(B)) provides: "It shall be an unfair labor practice for a labor organization or its agents * * * to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The Union raises three principal arguments against the Board's decision that discipline of supervisor-members for performing struck work for the Employer was prohibited by this Section. First, the Union urges that the Section should be interpreted literally so as only to prohibit unions from "restraining or coercing employers—not supervisors—in the selection of representatives for bargaining or grievance adjustment process." Second, it argues that even if Section 8(b)(1)(B) does prohibit union restraint or coercion against employers through the imposition of discipline on supervisor-members (who are concededly representatives of the employer) for their exercise of management responsibilities, it does not reach

[5] Thus the Board agreed with the Trial Examiner's decision as regards those supervisors whose disciplines remained in effect but, contrary to the Trial Examiner, concluded that as regards the two supervisors against whom charges were eventually dropped and the third whose discipline was revoked on appeal, the Union had also violated Section 8(b)(1)(B). It reasoned "[t]he fact that the Union brought charges of misconduct against these supervisors is sufficient to warrant the finding of a violation."

With regard to the Union's merely bringing charges against the one supervisor who did not possess a withdrawal card and in fining the other non-possessor of a withdrawal card, whose discipline was revoked on appeal, the restraint or coercion of the employer is not so clear. Since these supervisors had no cards, since the Union's actions against them were concededly the result of error, and since the Union professes no jurisdiction over them, it is difficult to see how the Company can reasonably be doubtful of their loyalty or how they might in fact be deterred from vigorously representing management's interests in their representative capacities. The situation may be different with respect to the hospitalized supervisor because he did retain a withdrawal card, and the Union's actions in preferring charges against him served notice on him that had he actually performed his managerial responsibility, the Union would surely have fined him. His loyalty and effectiveness in the future might be undermined. Nevertheless, the Union has not objected to the Board's treating the aborted discipline of any of these three supervisors on the same footing as the discipline of the others. Therefore, we do not actually reach the point, but do put the Board on notice that when the issue is live, the Board's conclusion as to restraint or coercion in similar circumstances will be closely scrutinized.

disciplinary action taken against these persons for their performance of struck work. Third, it contends that the Supreme Court's decision in *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, demonstrates that the Union's exertion of internal discipline against any members for crossing its picket lines is not restraint or coercion within the meaning of Section 8(b)(1)(B).

Each of these arguments was raised and rejected in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, ... F.2d ..... (D.C. Cir. 1972).[1] In that case also, the union disciplined supervisors who performed rank-and-file work during an economic strike. We are persuaded by much of Judge MacKinnon's reasoning and consider it largely dispositive of the arguments the Union makes on the facts of this case.[2] Although we shall not traverse in detail the same ground he has so thoroughly covered, because the panel in the District of Columbia Circuit was so sharply divided, we shall briefly respond to the Union's arguments and address what we believe to be the critical points of difference between the majority there and Judge Wright in dissent.

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[1] This opinion was prepared before the release of the District of Columbia's *en banc* opinion in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, ... F.2d ...., decided June 29, 1973. In its *en banc* opinion the District of Columbia Circuit also disposed of *National Labor Relations Board* v. *Florida Power & Light Co.*, wherein some of the supervisors disciplined for performing struck work were not included in the bargaining unit, were not represented by the union in bargaining, were only affiliated with the union by virtue of withdrawal cards, and were not shown to have been accorded an express option by the employer as to working during the strike. At the very least, insofar as it reaches an opposite conclusion on these facts, we disagree with the majority opinion therein and are in accord with Judge MacKinnon's dissenting opinion representing the views of himself and Judges Tamm, Robb, and Wilkey. The references herein to the *International Brotherhood of Electrical Workers* opinion refer to the prior panel opinion, ... F.2d .... (D.C. Cir. 1972).

[2] The facts in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, *supra*, are different in several respects from those in this case, and, of course, we intimate no view as to whether the differences call for a different result. In that case, the disciplined supervisors were full union members, were required to be union members under the terms of the union security provision of the collective bargaining agreement, and were members of the bargaining unit. Also, at the inception of the strike, the company expressly told the supervisors that the decision whether or not to respect the picket lines was up to the discretion of each individual foreman.

The Union's literal interpretation argument was squarely rejected by the Board in *San Francisco-Oakland Mailers No. 18*, 172 NLRB 2173 (1968). In that case the union brought charges against certain supervisor-members for alleged contract violations including the use of an assistant foreman to repair a machine and the permiting of non-union members to do bargaining unit work, and the union fined the supervisors for contempt when they failed to appear before the executive committee. In finding a violation of Section 8(b)(1)(B), the Board stated:

> "• • • Respondent's actions • • • were designed to change the Charging Party's representatives from persons representing the viewpoint of management to persons responsive or subservient to Respondent's will. In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. [Footnote omitted.] That Respondent may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the Charging Party by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charging Party's control over its representatives. Realistically, the Employer would have to replace its foremen or face *de facto* nonrepresentation by them." 172 NLRB at 2173.

Without exception the courts which have been faced with the question have interpreted Section 8(b)(1)(B) not merely to prohibit restraint or coercion directly aimed at an employer in his actual selection of his representatives but to forbid pressure against an employer accomplished indirectly by way of disciplinary action leveled against those whom the employer had selected to represent him for their conduct in performing their collective-bargaining or grievance-adjustment functions, which included contract interpretation.[9] We agree that an em-

[9] *Dallas Mailers Local 143 v. National Labor Relations Board*, 445 F.2d 730 (D.C. Cir. 1971); *National Labor Relations Board v. Lithographers Local Nos. 15-P and 272*, 437 F.2d 55 (6th Cir. 1971); *National Labor Relations Board v. Sheet Metal Workers Local 49*, 430 F.2d 1348 (10th Cir. 1970).

ployer's right to select those representatives whom he chooses would be worthless if the Union could accomplish the functional equivalent of restraining or coercing him in that selection by applying pressure upon those whom the employer has already selected so as to compromise their loyalty. But, like the District of Columbia Circuit, we do not believe Section 8(b)(1)(B) can properly be confined to apply only to union discipline of an employer representative that is based upon his actions on behalf of management regarding a specific disagreement with the Union over the negotiation of a contract term or the proper interpretation of the collective bargaining agreement or the adjustment of a specific grievance. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board, supra,* ..... F.2d at ....., Slip. Op. at 14.[10]

Because they are supervisors, an employer has a right to expect that whether they are union members or not, they will discharge their properly supervisory or managerial responsibilities in the best interests of the company. When the employer has a dispute with the union, and the union disciplines supervisors for performing their supervisory responsibilities on the employer's behalf in that dispute, that discipline "drive[s] a wedge between [the] supervisor[s] and the Employer" and may reasonably be expected to undermine the loyalty and effectiveness of these supervisors when called upon to act for the company in their representative capacities.[11] In this way

[10] See *Meat Cutters Local 81* v. *National Labor Relations Board,* 458 F.2d 794 (D.C. Cir. 1972) (discipline of supervisor-grievance adjustment representative for carrying out management's order to implement new meat procurement policy); *National Labor Relations Board* v. *New Mexico Dist. Coun. of Carpenters,* 454 F.2d 1116 (10th Cir. 1972) (discipline of supervisor-representative for working for an employer who was not making payments into the union's health and welfare fund and who had no working agreement with the union; discipline of supervisor-grievance adjustment representative for co-signing letter urging employees to vote against the union in an upcoming election).

[11] As the Sixth Circuit stated in a case where supervisors were fined for performing struck work in alleged derogation of the collective bargaining agreement, "[t]his conduct of the union would further operate to make the employees reluctant in the future to take a position adverse to the union, and their usefulness to their employer would thereby be impaired." *National Labor Relations Board* v. *Lithographers Locals Nos. 15-P and 272,* 437 F.2d 55, 57 (6th Cir. 1971). And in *Meat Cutters Local 81* v. *National Labor Relations Board,* 458 F.2d 794, 799

the union's discipline effects a "substitution of attitudes rather than of persons" and accomplishes the functional equivalent of forcing the employer to select representatives responsive to the union's interests.

In *International Brotherhood of Electrical Workers* v. *National Labor Relations Board, supra,* the dissent did not disagree that Section 8(b)(1)(B) would reach discipline imposed on a supervisor-representative for his exercise of a properly managerial responsibility. *Id.,* ..... F.2d at ....., Slip Op. at 42-45. However, in opposition to the panel majority, Judge Wright felt that the "performance of ordinary rank-and-file work * * * could not possibly be considered to fall within their [the supervisors'] ordinary managerial responsibilities." *Id.,* ..... F.2d at ....., ..., Slip Op. at 42, 45. We disagree and align ourselves more closely with the panel majority on this point.

We cannot accept the notion that supervisors who perform bargaining-unit work during a strike, at least in the absence of an express option to refuse to cross the picket line, are not exercising a properly supervisory responsibility because "under normal circumstances" that work is the responsibility of rank-and-file employees. *Id.,* ..... F.2d at ....., Slip. Op. at 45. What a supervisor's proper functions are when the full complement of employees is at work under the regime of a collective bargaining agreement then in force is not determinative of supervisory responsibility during a strike. Otherwise, with no employees to supervise, many supervisors would simply have no managerial responsibilities during a strike. But it can hardly be doubted that it is an essential part of the economic warfare involved in a strike for management to muster its resources in an effort to withstand the union's economic coercion. Equally undisputable, it would seem, is that an employer is not limited to com-

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[11] (Continued)

(D.C. Cir. 1972), where the union disciplined a supervisor for implementing the employer's new meat procurement policy, the Court stated, "* * * there would have been serious doubt thereafter as to whether he could represent the Company in a *bona fide* manner against the Union in other matters where their interests were adverse."

batting a strike only with his pocketbook while the business lies idle. Rather, management has "traditionally" (*id.*) relied upon supervisors, where practicable, to pitch in and perform rank-and-file work in an attempt both to strengthen its bargaining position and to preserve the enterprise from collapse during and adverse economic repercussion following a strike. Insofar as the supervisors work to give the employer added economic leverage, they are acting as members of the management team are expected to act when the employer and union are at loggerheads in their most fundamental of disputes. Indeed, in a real sense they are representing the employer for the purpose of collective bargaining, for "the use of economic pressure by the parties to a labor dispute • • • is part and parcel of the process of collective bargaining." *National Labor Relations Board* v. *Insurance Agents International Union,* 361 U.S. 477, 495. Insofar as their effort helps to keep the business going in order to fulfill commitments to customers and to preserve the company's clientele and good name from deterioration, it lies at the very core of the entrepreneurial function. Assuredly here where the Company is an electric power company, holding a monopoly, its managment has an especial obligation to continue to provide an indispensable public service during a time of strike. Accordingly, we think supervisors who act in their employer's interests by performing rank-and-file work during a strike are indeed performing a properly managerial function.

Any suggestion that *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175, has controlling significance for this case because the words "restrain or coerce" are common to Sections 8(b)(1)(A) and 8(b)(1)(B) and because in both cases the Unions imposed fines for the performance of struck work (*International Brotherhood of Electrical Workers* v. *National Labor Relations Board, supra,* ..... F.2d at ....., Slip Op. at 49-54) must be rejected. *Allis-Chalmers* only considered the question whether union fines against employee-members for strikebreaking constituted an unfair labor practice under Section 8(b)(1)(A) as a restraint or coercion of those employees in the exercise of their Section 7 right

to refrain from concerted activities.[12] *Id.* at 176. Here the question is whether the imposition of discipline against supervisor-members for performing struck work is an unfair labor practice under Section 8(b)(1)(B) as a restraint or coercion of the employer in his right to select and retain loyal representatives. Since Sections 8(b)(1)(A) and 8(b)(1)(B) protect different interests, it simply does not follow that discipline which does not amount to restraint or coercion of the employee under the former cannot constitute restraint or coercion of the employer under the latter. The analysis of the employee-member's relationship with his union on which *Allis-Chalmers* is predicated is not apposite or adequate when the employer claims that the union's discipline of its members interfered with his protected relationship with his representatives.

In *Allis-Chalmers* the Supreme Court concluded that Congress did not intend in enacting Section 8(b)(1)(A) to regulate internal union affairs to the extent of stripping unions of the power to fine members for strikebreaking (*Id.* at 183), but that says nothing about the proper reach of Section 8(b)(1)(B), by which Congress evidenced a concern to deprive the unions of power to turn the employer's representatives against him. Recently the Supreme Court has explained that the basis of its holding in *Allis-Chalmers* was that Section 8(b)(1)(A) was "not intended by Congress to apply to the imposition of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act." *National Labor Relations Board* v. *The Boeing Co.*, ... U.S. ....., ..., 41 U.S.L.W. 4678, 4679. Where, as here, Congress granted express protection to the employer-representative relationship it cannot be said that Congress intended to leave

[12] Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)) provides:
"It shall be an unfair labor practice for a labor organization or its agents • • • to restrain or coerce • • • employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein • • •."
Section 7 (29 U.S.C. § 157) provides in pertinent part:
"Employees shall have the right to • • • engage in • • • concerted activities • • •, and shall also have the right to refrain from any or all of such activities • • •."

the union as free to discipline its members as it did in enacting Section 8(b)(1)(A).

Accordingly, *Allis-Chalmers* does not control this case. To be sure the Union's interest in enforcing a rule against its members crossing picket lines must be acknowledged, but in our view its enforcement against supervisor-members who are employer representatives "impairs [a] policy Congress has imbedded in the labor laws." *National Labor Relations Board* v. *Textile Workers*, 409 U.S. 213, 216; *Scofield* v. *National Labor Relations Board*, 394 U.S. 423, 430.

The Union also argues that since the Company allowed its supervisors to retain union membership, it thus voluntarily agreed that the Union could exert its discipline over these members. Undoubtedly by permitting employees promoted to supervisory positions to retain withdrawal cards, the Company must be taken to have acquiesced in some union control over those supervisors who requested the cards. But to agree that the Company acceded to some union control hardly means that the Company waived its right to the protection of Section 8(b)(1)(B). Even where employers have agreed to union security provisions requiring supervisors to be full union members, and they were included in the bargaining unit, no waiver of the protection of Section 8(b)(1)(B) has been found. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board, supra,* ..... F.2d at ....., Slip Op. at 15-16; *Lithographers Locals 15-P and 272 (The Toledo Blade Co., Inc.)*, 175 NLRB 1072, 1080, enforced, 437 F.2d 55 (6th Cir. 1971); *see Meat Cutters Local 81* v. *National Labor Relations Board*, 458 F.2d 794, 796 n. 3 (D.C. Cir. 1972). Whether or not that view is correct, surely no waiver should be found here where the supervisors were not in the bargaining unit and retained only a vestigial membership status entitling them to nothing more than a waiver of reinstatement requirements and, in the case of the participating withdrawal card-holder, certain pension and insurance benefits. Indeed, the logical upshot of the Union's argument is that the Company acquiesced in any discipline the Union might impose on a supervisor for practically anything since the Union's constitution, to which the with-

drawal card-holders are subject, makes it an offense to work "in the interest of any organization or cause which is detrimental to, or opposed to, the I.B.E.W."[13] Furthermore, the withdrawal card, and in turn the Company's agreement that promoted supervisors could request and retain the cards, hardly clear by their own terms, must be construed as ambulatory with respect to changes in the Union's constitution. If the Company waived the protection to which it is entitled under Section 8(b)(1)(B), that waiver must be found in clear and unmistakable terms. See *National Labor Relations Board* v. *Wisconsin Aluminum Foundry Co.*, 440 F.2d 393, 399-400 (7th Cir. 1971). Since we cannot find such an expression of waiver, the measure of union control over supervisor-members in which the Company acquiesced is only that which is without the reach of Section 8(b)(1)(B).

Accordingly, the Board's order will be enforced.

KILEY, *Circuit Judge*, dissenting.

I respectfully dissent, for the reasons so ably and persuasively expressed by Judge Skelly Wright in writing the opinion for the District of Columbia Circuit On Rehearing *En Banc* in *International Brotherhood of Electrical Workers, etc., et al.* v. *National Labor Relations Board*, Nos. 71-1558 and 71-1712, decided June 29, 1973.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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[13] International Brotherhood of Electrical Workers Constitution, Article XXVII, Section 1.(10).

USCA 4013—The Scheffer Press, Inc., Chicago, Illinois—7-13-73—200

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
SAN FRANCISCO TYPOGRAPHICAL UNION No. 21, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Respondent.

Nos. 71-2949 and 71-2987

[May 18, 1973]

On Application for Enforcement of an Order of the National Labor Relations Board

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Before: MERRILL and ELY, Circuit Judges, and SOLOMON, District Judge.*

SOLOMON, District Judge:

The National Labor Relations Board (the Board) seeks to enforce its orders directing the Typographical Union to rescind the disciplinary actions the Union took against four members who were supervisory employees of the San Rafael Independent Journal (Journal). The Board contends that the Union may not punish these men for violating Union rules and policy, even though they crossed and worked behind the Union's picket lines.

Gordon Dixon was the mechanical superintendent and the foreman of the composing room. On October 10, 1969, Dixon, exercising his authority as foreman, discharged Paul Austin because Austin took an afternoon off without permission. The Union voted to require Dixon to reinstate Austin, but Dixon refused. The President of the Union filed charges against Dixon, and, after a hearing, Dixon was fined $118.00.

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*Honorable Gus J. Solomon, United States District Judge, Portland, Oregon, sitting by designation.

The Board determined that the Union's action was an unfair labor practice, and it ordered the Union to rescind the fine and expunge Dixon's record.

Later, the Union disciplined Robert Dixon, Earl Dixon and Ernest Fingerlos because they crossed the Union's picket line. On January 7, 1970, the Union struck the Journal after a breakdown in contract negotiations. Robert and Earl Dixon, both assistant foremen in the composing room, ignored the picket line and continued to work. The Union expelled and fined them each $10,000.00 for strikebreaking.

Ernest Fingerlos was the chief machinist. Fingerlos first joined the strike but returned to his job about three months later while the strike was still in progress. The Union expelled Fingerlos and fined him $10,000.00.

Gordon Dixon also crossed the picket line and was charged with strikebreaking. The Union had tried him, but at the time of the Board's hearing, the results were not known to the trial examiner.

The Board found that the Union illegally punished the strikebreakers and ordered the Union to rescind the fines, reinstate the men, and expunge their records.

Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, defines unfair labor practices. It provides, in part, that:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
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> . . . .

The Board acknowledges that Section 8(b)(1)(A) does not prevent a union from imposing reasonable fines on members who cross a picket line, or from expelling them. *NLRB v. Allis-*

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Gordon Dixon was the mechanical superintendent and the foreman of the composing room. On October 10, 1969, Dixon, exercising his authority as foreman, discharged Paul Austin because Austin took an afternoon off without permission. The Union voted to require Dixon to reinstate Austin, but Dixon refused. The President of the Union filed charges against Dixon, and, after a hearing, Dixon was fined $418.00.

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*Honorable Gus J. Solomon, United States District Judge, Portland, Oregon, sitting by designation.

The Board determined that the Union's action was an unfair labor practice, and it ordered the Union to rescind the fine and expunge Dixon's record.

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> . . . .

The Board acknowledges that Section 8(b)(1)(A) does not prevent a union from imposing reasonable fines on members who cross a picket line, or from expelling them. *NLRB v. Allis-*

Chalmers Mfg. Co., 388 U.S. 175 (1967). But the Board contends that here the Union violated Section 8(b)(1)(B) because the members were supervisors.

The Union contends that it can discipline a supervisor for the same reasons it can discipline any other member.

The Union fined Gordon Dixon because he discharged an employee. Dixon acted in his capacity as a foreman empowered by the Journal to punish employees who violate company rules. By fining Dixon, the Union interfered with Dixon's position as a supervisor and committed an unfair labor practice under Section 8(b)(1)(B). *NLRB v. Toledo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers Int'l. Union*, 437 F.2d 55 (6th Cir. 1971).

The Union's punishment of the strikebreakers presents a different issue. Although Robert and Earl Dixon and Ernest Fingerlos were supervisors, the Union did not punish them for exercising any management duty.

These three men refused to honor the picket line of their Union, and there is no reason to treat them differently than non-supervisors. The Journal's right to select management representatives under Section 8(b)(1)(B) is not affected by the Union's action.

In *Allis-Chalmers*, the Supreme Court said that "[t]he economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement on its own terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . . .'" *Id.* at 181. Here, the Board's broad interpretation of Section 8(b)(1)(B) threatens that power. It is an unjustifiable extension of the limited language of Section 8(b)(1)(B). Had the members elected to resign from the Union, the power of the Union over them would have ended. *NLRB v. Granite State Joint Board, etc.*, 41 U.S.L.W. 4074 (U.S. Dec. 7, 1972). But here the members remained in the Union, and therefore continued to be subject to their obligations as members.

The Board has not passed on whether the $10,000 fines are unreasonable, and therefore illegal, under *Allis-Chalmers*. We

express no opinion on that issue. The Board must make that determination in the first instance. *Morton Salt Co. v. NLRB*, No. 71-1853 (9th Cir., Dec. 8, 1972), *petition for cert. filed*, March 6, 1973, No. 72-1210.

The issue of whether the expelled members lose their Union benefits is not properly before us, and we express no opinion on that issue.

We grant enforcement of the Board order rescinding the $418.50 fine against Gordon Dixon, and we remand to the Board for further proceedings relative to the $10,000.00 fines. Otherwise, enforcement is denied.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 5-23-73—480

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1559

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 71-1785

BELL SUPERVISORS PROTECTIVE ASSOCIATION (NOT A LABOR ORGANIZATION), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petitions for Review and Cross-Application for Enforcement of Order of the National Labor Relations Board

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Decided September 22, 1972

Mr. Laurence J. Cohen and *Mr. Robert E. Fitzgerald, Jr.*, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, for petitioners in No. 71-1559.

Mr. George B. Christensen for petitioner in No. 71-1785.

Mr. Daniel M. Katz, Attorney, National Labor Relations Board, with whom *Messrs. Marcel Mallet-Prevost*, Assistant General Counsel, and *Warren M. Davison*, Deputy Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Before WRIGHT and MACKINNON, *Circuit Judges*, and MATTHEWS,* *U.S. Senior District Judge* for the District of Columbia.

Opinion filed by MACKINNON, *Circuit Judge*.

Opinion filed by WRIGHT, *Circuit Judge*, concurring in part and dissenting in part, at p. 36.

MACKINNON, *Circuit Judge*: Illinois Bell Telephone Company (hereinafter referred to as the Company or the Employer) and its predecessors have maintained a contractual relationship with Local 134, International Brotherhood of Electrical Workers, AFL-CIO (hereinafter referred to as Local 134) since 1909. Local 134 represents the Company's Chicago workers in the "Plant Department," including not only journeymen and apprentices employed as P.B.X.[1] installers but also persons employed as "P.B.X. Installation Foremen," "Building Cable Foremen," and "General Foremen."[2] Under Article III, Sec-

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* Sitting by designation pursuant to 28 U.S.C. § 294(c) (1970).

[1] "P.B.X." is the abbreviation for "private branch exchange," the telephone apparatus installed and maintained by the Company on the private premises of a customer.

[2] This arrangement whereby foremen and rank-and-file

tion 1 of the collective bargaining agreement between Local 134 and the Company, which was in effect at all times relevant to the instant case, all members of the bargaining unit, including the above-mentioned foremen, were required to become and remain members of Local 134 within thirty days of the commencement of their employment.[3]

Between May 8, 1968, and September 20, 1968, Local 134 engaged in an economic strike against the Company. At the inception of this strike, the Company informed the foremen that it would like to have them come to work during the work stoppage, but it told them that the decision whether to work or to respect the strike was a matter left to the personal discretion of each individual foreman. The Employer indicated that those who chose not to work would not be penalized. On the other hand, a Local 134 representative warned the foremen, at a union meeting held immediately before the strike, that they would be subject to union discipline if they performed rank-and-file work[4] during the strike. In response to this warning, several foremen formed the Bell Supervisors Protective Association (hereinafter referred to as the Association), and

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employees have been included in the same bargaining unit was voluntarily consented to by the Employer.

[3] Although collective bargaining agreements between the parties had at one time prescribed the monthly wage rates applicable to foremen, recent contracts have not contained such wage provisions. However, the agreement relevant here included a section entitled "Working Conditions for General Foremen and Foremen," which concerned payment for overtime work and for certain absences. Furthermore, when the Company recently revised the overtime schedule pertaining to foremen, it requested the concurrence of Local 134.

[4] "Rank-and-file work" concerns that work which is ordinarily performed by regular, non-supervisory employees in the bargaining unit.

through it they retained counsel to protect the rights of those foremen who chose to work during the strike. The Association also planned to encourage other Company foremen to report to work during the work stoppage.

During the course of the strike, some of the foremen reported to work and performed rank-and-file work, while other foremen chose to honor the strike and stayed away from work. After the strike, the Company in no way discriminated against the latter group, and it indeed promoted some of them to higher positions. Local 134, however, carried out its pre-strike warning and conducted disciplinary proceedings against a number of foremen.[5] Local 134 imposed fines of $500 on each foreman who performed rank-and-file work during the strike, and it imposed fines of $1,000 each on the five foremen who were instrumental in the formation of the Association. Most of the foremen who were fined exercised their right under the constitution of the International Brotherhood of Electrical Workers, AFL-CIO (hereinafter referred to as the International Union) to appeal from the disciplinary action of Local 134—first to the International Union Vice President, and then to the International Union President. The appellants contended that Local 134's imposition of fines upon them was illegal, and they asserted that the contractual union-security provision which required them to be members of Local 134 was similarly unlawful. Of those foremen who appealed, three had their appeals sustained on the ground that the charges against them had not been timely filed. Three others had their appeals disqualified based upon the procedural ground that their appeals were untimely. The other appellants had their disciplinary fines upheld. Local 134 has commenced suit in

[5] Pursuant to the union-shop provision in the applicable collective bargaining agreement, these foremen were all full members of Local 134.

the Illinois courts to collect some of the fines. Insofar as any of the foremen have paid any part of the fines, the Company has reimbursed them.

In June of 1969, the Association filed an unfair labor practice charge with the National Labor Relations Board (Labor Board or N.L.R.B.), alleging that Local 134 and the International Union had violated section 8(b)(1)(B) of the National Labor Relations Act, as amended (N.L.R.A.),[6] by fining the Company foremen because of their performance of rank-and-file work during the 1968 strike and by fining the five foremen who were instrumental in the formation of the Association. A complaint was issued pursuant to this charge, and a hearing relating thereto was held before Trial Examiner Frederick Reel. The first three days of hearings were devoted exclusively to the section 8(b)(1)(B) issue. However, on the afternoon of the fourth and final day of hearings, as the hearings were about to be closed, counsel for the Association offered a motion to amend the complaint "to Conform Pleading [*i.e.*, the complaint] to Proof." The Association indicated that the collective bargaining agreement which contained the union-security provision had been admitted into evidence as part of the section 8(b)(1)(B) case, and it argued that this provision was in clear violation of section 8(a)(3)(i) of the N.L.R.A., since it covered a bargaining unit which included both "employees" and "supervisors."[7]

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[6] 29 U.S.C. § 158(b)(1)(B) (1970) provides: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

[7] 29 U.S.C. § 158(a)(3) (1970) provides in relevant part:

(a) It shall be an unfair labor practice for an employer—

(2) by discrimination in regard to hire or tenure of

The counsel for the General Counsel of the Labor Board did not join in or consent to the Association's motion to amend the complaint.[8] The Trial Examiner noted

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employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made; * * *

Since the bargaining unit included supervisors [see note 12 and accompanying text and note 24, *infra*.] with regular rank-and-file employees, the Association contended that the unit covered by the Company-Local 134 union-shop provision was not "appropriate" within the meaning of section 8(a)(3)(i). However, due to the fact that Local 134 was the only one of the two contracting parties before the Trial Examiner, the Association did not allege a violation of section 8(a)(3)(i), which only applies to employers, but it instead asserted the presence of a section 8(b)(2) violation. 29 U.S.C. § 158(b)(2) (1970) provides, *inter alia*: "It shall be an unfair labor practice for a labor organization or its agents— * * * (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section [*i.e.*, section 8(a)(3)] * * *"

[8] It is important to note that the precise issue concerning the legality of the union-security provision under section 8(a)(3)(i) of the N.L.R.A. had been previously raised by the Association, in 1968, at which time the General Counsel of the Labor Board refused to issue a complaint relating to the Association's unfair labor practice charge. Case 13-CA-8451. At that time, the General Counsel concluded:

The inclusion of alleged supervisors in the unit by vol-

that the identical legal contention presented by the Association had previously been rejected by the General Counsel,[9] and he decided that it would not be appropriate to permit such an amendment under the circumstances of the case before him. He noted that "the amendment offered by the [Association] would of necessity add factual allegations to the complaint as well as new [N.L.R.A.] subsections to the list of those violated."[10] The Trial Examiner pointed out that the Association was seeking the invalidation of a contractual provision which had been in existence for many years, and he emphasized the fact that cases which had been recently before the Labor Board itself had involved such union-shop arrangements without evoking any intimation that the Board found anything irregular in them. In finally concluding that it would be "inadvisable" to permit the Association's amendment, the Trial Examiner said that he doubted "the wisdom of deciding so far reaching a question which enters this litigation only by the back door, as it were."[11] The N.L.R.B. sustained this determination.

The Labor Board concluded, in agreement with the Trial Examiner, that the Company foremen in question were "supervisors" within the meaning of section 2(11) of

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untary agreement of the contracting parties did not, standing alone, constitute an unfair labor practice, nor did it render such unit inappropriate for coverage by an otherwise valid union security clause. See *Nassau & Suffolk Contractors Ass'n.*, 118 NLRB 174, 177-184; * * *

[9] *See* note 8, *supra.*

[10] *International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, I.B.E.W.*, 192 NLRB No. 17, T.X.D. slip op. at 13, 1971 CCH NLRB ¶ 23,282 (1971).

[11] *Id.*

the Act,[12] at all times relevant to the case. It also affirmed the determination that such foremen were "Employer representatives" within the meaning of section 8(b)(1)(B) of the Act.[13] The Labor Board finally concurred in the Trial Examiner's conclusion that both unions—Local 134 and the International Union[14]—had restrained and coerced the Company in the selection of its collective bargaining and grievance adjustment representatives, in violation of section 8(b)(1)(B), by disciplining foremen/members for performing rank-and-file work during the 1968 strike and by fining foremen/members because of their action in forming the Association. A cease and desist order was issued, and the two unions were affirmatively ordered to rescind, and expunge all records of the fines imposed upon the foremen in violation of section 8(b)(1)(B) of the N.L.R.A.; to reimburse the foremen for any portions of their fines already paid; to advise each such foreman in writing that the fines have been rescinded and that the records pertaining thereto have been expunged; and to post appropriate notices.

The two unions and the Association petitioned this

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[12] 29 U.S.C. § 152(11) (1970). *See N.L.R.B. v. Henry Colder Co.*, 416 F.2d 750, 754 n.3 (7th Cir. 1969), and cases cited therein.

[13] *See* note 6, *supra*. Local 134 and the International Union have not challenged, on appeal, the Labor Board's findings that the foremen were "supervisors" and "Employer representatives," within the meaning of the N.L.R.A.

[14] The Labor Board found the International Union in violation of section 8(b)(1)(B), due to its affirmance, on appeal, of Local 134's imposition of disciplinary fines against the foremen. However, the Board's remedial order only provided for secondary liability on the part of the International Union with respect to the reimbursement of already collected fines and the providing of individual written notices for the disciplined foremen.

court for review of the Labor Board's decision, and the N.L.R.B. filed a cross-application for enforcement of its order. We affirm the decision of the Labor Board insofar as it pertains to the section 8(b)(1)(B) determination and the denial of the Association's request to amend the complaint. However, while enforcement of the Board's remedial order against Local 134 is granted in full, we believe that the remedial order against the International Union must be modified to reflect its proper measure of unfair labor practice responsibility.

I

Section 8(b)(1)(B) of the N.L.R.A. prohibits union coercion or restraint of an employer "in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."[15] This provision, of course, clearly proscribes *direct* union interference with an employer's selection of his section 8(b)(1)(B) representatives.[16] However, as the Labor Board and several courts, including this one, have recently recognized, it also has much broader application. It prohibits *indirect* union restraint or coercion of an employer, accomplished through the imposition of discipline upon the employer's representatives for actions performed by them within the general scope of their supervisory or managerial responsibilities. Although the unions involved in the instant case have challenged this latter interpretation of section 8(b)

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[15] *See* note 6, *supra*.

[16] *See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B.*, —— U.S.App.D.C. ——, ——, 458 F.2d 794, 798 (1972); *N.L.R.B. v. Local 294, International Brotherhood of Teamsters*, 284 F.2d 893 (2nd Cir. 1960); *Los Angeles Cloak Joint Board*, 127 NLRB 1543, 1550-1551 (1960); *International Union of Operating Engineers, Local 825*, 145 NLRB 952, 962 (1964).

(1)(B) as being an unwarranted extension of the express language of the statutory provision, we must reject this assertion as contrary to the legislative intent of Congress.

A. *OAKLAND MAILERS* AND ITS PROGENY

In *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union*, 172 NLRB No. 252, 1968-2 CCH NLRB ¶ 20,195 (1968), the N.L.R.B. held illegal union actions which "were designed to change the [employer's] representatives from persons representing the viewpoint of management to persons responsive or subservient to [the union's] will."[17] In reaching the conclusion that the union's imposition of discipline on supervisors because of the manner in which they interpreted and applied the collective bargaining agreement violated section 8(b)(1)(B), the labor Board noted:

> In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. *That [the union] may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the [employer] by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [employer's] control over its representatives. Realistically, the Employer would have to replace its foremen or face de facto nonrepresentation by them.*[18]

More recent Labor Board and court decisions have further applied the doctrine enunciated in *Oakland Mailers*.

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[17] 172 NLRB No. 252, slip op. at 2, 1968-2 CCH NLRB ¶ 20,195.

[18] 172 NLRB No. 252, slip op. at 2-3, 1968-2 CCH NLRB ¶ 20,195 (emphasis supplied). *See New Mexico District Council of Carpenters and Joiners of America*, 176 NLRB No. 105, slip op. at 4-5, 1969 CCH NLRB ¶ 20,951 (1969), *enfd.*, —— F.2d ——, 67 L.C. ¶ 12,403 (10th Cir. 1972).

In *N.L.R.B. v. Toledo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers International Union*, 437 F.2d 55 (6th Cir. 1971), wherein the court upheld the Labor Board's finding of a section 8(b)(1)(B) violation, the Sixth Circuit stated:

> This conduct of the union could very well be considered as an endeavor to apply pressure on the supervisory employees of the [employer], and to interfere with the performance of the duties which the employer required them to perform * * * and to influence them to take action which it, the employer, might deem detrimental to its best interests. This conduct of the union *would further operate to make the [supervisory] employees reluctant in the future to take a position adverse to the union, and their usefulness to their employer would thereby be impaired.*

437 F.2d at 57 (emphasis supplied). *See New Mexico District Council of Carpenters and Joiners of America*, 177 NLRB 500, 502 (1969), *enfd.*, —— F.2d ——, 67 L.C. ¶ 12,403 (10th Cir. 1972); *N.L.R.B. v. Sheet Metal Workers, Local 49*, 430 F.2d 1348, 1349-1350 (10th Cir. 1970); *Local Union No. 2150, International Brotherhood of Electrical Workers*, 192 NLRB No. 16, slip op. at 5-6 and cases cited n.5, 1971 CCH NLRB ¶ 23,280 (1971).

This court has also recognized the fact that the imposition of fines upon supervisory employees may coerce or restrain their employer in the effective selection of his representatives within the meaning of section 8(b)(1)(B). *See Dallas Mailers Union, Local 143 v. N.L.R.B.*, 144 U.S. App.D.C. 254, 259, 445 F.2d 730, 735 (1971). Although we did not expressly evaluate the propriety of the legal rationale underlying the *Oakland Mailers'* line of cases in our *Dallas Mailers* opinion, we implicity recognized its correctness. However, in our subsequent *Meat Cutters* opinion,[10] we gave our express approval to the decisions

[10] *Meat Cutters Union Local 81 of the Amalgamated Meat*

which had interpreted section 8(b)(1)(B) as prohibiting union discipline of supervisory personnel for acts performed by them in the course of their supervisory or managerial duties.[20] Our conclusion was based upon the intention of Congress as expressed in the legislative history surrounding the enactment of section 8(b)(1)(B) in 1947.

The Supreme Court has recognized the fact "that labor legislation is peculiarly the product of legislative compromise of strongly held views, *Local 1976, Carpenters' Union v. Labor Board*, 357 U.S. 93, 99-100, and that legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace [or not embrace] conduct called in question. *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 619-620."[21] When Congress was considering amendments to the National Labor Relations Act in 1947, it was acutely aware of the fact that unions had previously "taken it upon themselves to say that management should not appoint any representative who [was] too strict with the membership of the union," and through the enactment of section 8(b)(1)(B) it endeavored "to prescribe a remedy in order to prevent such interferences."[22] Although this fact is highly pertinent to our evaluation of the proper scope of section

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Cutters and Butcher Workmen of North America v. N.L.R.B., —— U.S.App.D.C. ——, 458 F.2d 794 (1972).

[20] *Id.*, —— U.S.App.D.C. at ——, 458 F.2d at 798-799.

[21] *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 179 (1967).

[22] II *Legislative History of the Labor Management Relations Act, 1947* (N.L.R.B. 1948) [hereafter *"Legislative History"*] at 1077 (comments of Senator Ellender). *See* S. REP. No. 105, 80th Cong., 1st Sess. 21 (1947), in I *Legislative History* at 427; II *Legislative History* at 1524 (comments of Senator Ball).

8(b)(1)(B), other legislative history surrounding the 1947 amendments must also be considered.

Section 8(b)(1)(B) must not be examined in a vacuum. It must instead be interpreted in conjunction with the other 1947 amendments to the N.L.R.A. relating to supervisory personnel.[23] The fact that Congress decided to expressly exclude "supervisors" from the statutory definition of "employee" in section 2(3)[24] is highly informative.

> Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its *intent to make the obligations to the employer paramount.* That provision excepts foremen from the protection of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of *ensuring their undivided loyalty, in spite of any union obligations.* See H. Rep. No. 245, 80th Cong., 1st Sess. 14-17 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947); L.A. Young Spring & Wire Corp. v. National Labor Relations Board, 1947, 82 U.S.App.D.C. 327, 163 F.2d 905, certiorari denied 1948, 333 U.S. 837 * * *[25]

In *Meat Cutters*, we considered this prior analysis of the 1947 legislative history and concluded that "[a] supervisor's obligations to his union simply cannot detract

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[23] *See* sections 2(3), 2(11), and 14(a), 29 U.S.C. §§ 152(3), 152(11), and 164(a) (1970).

[24] 29 U.S.C. § 152(3) (1970) provides, *inter alia*: "The term 'employee' shall include any employee * * * but shall not include * * * any individual employed as a supervisor * * *" *See* section 2(11) of the Act, 29 U.S.C. § 152(11) (1970), for the statutory definition of "supervisor."

[25] *Carpenters District Council of Milwaukee v. N.L.R.B.*, 107 U.S.App.D.C. 55, 57, 274 F.2d 564, 566 (1959) (emphasis supplied). *See* II *Legislative History* at 1524 (comments of Senator Ball).

from the absolute duty, evidenced by section 8(b)(1)(B), which he owes to his employer when exercising his managerial authority."[26]

To ensure the accomplishment of the clear intention of Congress when it enacted section 8(b)(1)(B), that provision must not be interpreted in a hyper-technical manner. To construe that section as only applying to union discipline of a supervisor based upon his actions on behalf of management regarding a specific disagreement with the union over the proper interpretation of the collective bargaining agreement or the adjustment of a particular grievance, would defeat the reasons underlying Congress' enactment of section 8(b)(1)(B). When a supervisor is disciplined by a union because of the manner in which he exercised his supervisory or managerial authority—whether or not he was applying a contract provision or adjusting a grievance—that disciplinary action necessarily impinges upon the supervisor's loyalty to his employer, thereby effectively depriving the employer of the undivided loyalty which he has the right to expect under section 8(b)(1)(B). The fact that in such a situation the union "may [seek] the substitution of attitudes rather than persons, and may [exert] its pressure upon the [employer] by indirect rather than direct means, cannot alter the ultimate fact that pressure [is] exerted * * * for the purpose of interfering with the [employer's] control over its representatives * * * [and it realistically will] have to replace its foremen or face *de facto* nonrepresentation

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[26] *Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B.*, —— U.S.App.D.C. ——, ——, 458 F.2d 794, 800 (1972). *See Texas Co. v. N.L.R.B.*, 198 F.2d 540, 542 (9th Cir. 1952), wherein the court stated that "it is clear from the history of the Taft-Hartley legislation that Congress intended to restore to employers the right and power to insist upon the undivided loyalty of their supervisory personnel."

by them."[27] It is therefore intuitively obvious that if the principles underlying the Congressional enactment of section 8(b)(1)(B) are to be given full effect, such conduct by a union cannot be permitted, as the National Labor Relations Board has properly recognized.[28]

The fact that section 14(a) of the N.L.R.A.[29] permits supervisors to be union members does not detract from the undivided loyalty they owe to their employer under section 8(b)(1)(B) when they are engaged in supervisory or managerial endeavors. *See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B.* —— U.S.App.D.C. ——, ——, 453 F.2d 794, 799-800 (1972). Similarly, the fact that an employer may have consented to the compulsory union membership of his supervisors under an appropriate union-security provision does not negate his

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[27] *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union*, 172 NLRB No. 252, slip op. at 3, 1968-2 CCH NLRB ¶ 20,195 (1968).

[28] This interpretation of section 8(b)(1)(B) does *not* mean that a union may *never* discipline a supervisor/member for breaching a valid union rule. *See, e.g., Local 453, Brotherhood of Painters, Decorators and Paperhangers of America*, 183 NLRB No. 24, 1970 CCH NLRB ¶ 21,981 (1970). It only proscribes union interference for acts performed by a supervisor relating to his supervisory or managerial duties. *See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B.*, —— U.S.App.D.C. ——, 453 F.2d 794 (1972).

[29] 29 U.S.C. § 164(a) (1970) provides:

> (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

right to the full protection of section 8(b)(1)(B). *See Toledo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers International Union*, 175 NLRB 1072, 1080 (1969), *enf'd.*, 437 F.2d 55 (6th Cir. 1971); *Local Union No. 2150, International Brotherhood of Electrical Workers*, 192 NLRB No. 16, slip op. at 5, 1971 CCH NLRB ¶ 23,230 (1971).

B. EFFECT OF *ALLIS-CHALMERS* AND SCOFIELD

In our previous *Meat Cutters* decision, we briefly explained why the rationale underlying the Supreme Court's decisions in *Allis-Chalmers*[30] and *Scofield*[31] does not relieve a union from responsibility under section 8(b)(1)(B) where it imposes disciplinary fines upon supervisor/members because of supervisory or managerial acts performed by them.[32] However, due to the close factual similarity between the instant case and the *Allis-Chalmers* situation, we believe that an expanded analysis here would be beneficial.

In *Allis-Chalmers* and *Scofield*, the Supreme Court sanctioned the imposition of fines by unions on *employees*—*not supervisors*—who had violated valid union rules. However, those cases, unlike the present one, concerned the scope of section 8(b)(1)(A) of the Act,[33] not section 8(b)

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[30] *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

[31] *Scofield v. N.L.R.B.*, 394 U.S. 423 (1969).

[32] *See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B.*, —— U.S.App.D.C. ——, ——, 458 F.2d 794, 800-801 (1972).

[33] 29 U.S.C. § 158(b)(1)(A) (1970) provides:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exer-

(1)(B), with which we are herein concerned. In upholding the union fines in *Allis-Chalmers* and *Scofield*, while the Supreme Court did not rely upon the *express* language of the *proviso* to section 8(b)(1)(A), as the Labor Board had originally done in *Minneapolis Star and Tribune Co.*, 109 NLRB 727 (1954), it did draw "cogent support" for its decision from it.[34] *See N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191-192 (1967); *Scofield v. N.L.R.B.*, 394 U.S. 423, 428 (1969). *See also* Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067, 1128 (1970). The applicability of that *proviso* is, however, clearly limited to section 8(b)(1)(A), which regulates the union-employee relationship. It is *not* a part of section 8(b)(1)(B), which directly regulates only the union-employer relationship.[35] Although reliance

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cise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

See 29 U.S.C. § 157 (1970).

[34] *Compare Booster Lodge No. 405, International Association of Machinists and Aerospace Workers v. N.L.R.B.*, —— U.S.App.D.C. ——, ——, 459 F.2d 1143, 1149, *with Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B.*, —— U.S.App.D.C. ——, ——, 458 F.2d 794, 800 (1972).

[35] *See San Francisco-Oakland Mailers' Union No. 18, International Typographical Union*, 172 NLRB No. 252, slip op. at 4, 1968-2 CCH NLRB ¶ 20,195 (1968); *Price v. N.L.R.B.*, 373 F.2d 443, 446 (9th Cir. 1967), *cert. denied*, 392 U.S. 904 (1968); *Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B.*, —— U.S.App.D.C. ——, ——, 458 F.2d 794, 800-801 (1972). *See also* II *Legislative History* at 1139, 1141, and 1200.

upon the *proviso* may not have been critical to the Supreme Court's decisions in *Allis-Chalmers* and *Scofield*, the fact that it does not have any application in section 8(b)(1)(B) cases indicates that the rationale underlying those two Supreme Court decisions is not apposite with respect to cases, such as the instant one, which involve the disciplining, by unions, of "supervisors" instead of "employees." Furthermore, a closer evaluation of the *Allis-Chalmers* and *Scofield* decisions clearly demonstrates that the reasoning of those opinions is not applicable with respect to section 8(b)(1)(B) cases.

Under the reasoning of *Allis-Chalmers* and *Scofield*, only legitimate *internal union affairs* are protected. *See N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 185-187, 195 (1967); *Scofield v. N.L.R.B.*, 394 U.S. 423, 428 (1969).[36] Those cases primarily concerned the relationship between the unions and their employee/members, and the Court concluded that the union discipline had no improper effect on parties external to that relationship. However, when a union imposes discipline upon a *supervisor*/member for acts performed by him in furtherance of his supervisory or managerial duties, *external* relationships which are *not* protected by the rationale underlying *Allis-Chalmers* and *Scofield* are affected.[37] The supervisor-em-

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[36] *See also N.L.R.B. v. Sheet Metal Workers, Local 49*, 430 F.2d 1348, 1350 (10th Cir. 1970); *N.L.R.B. v. Toledo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers International Union*, 437 F.2d 55, 57 (6th Cir. 1971).

[37] *See Silard, Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 GEO. WASH. L.REV. 187, 196 (1969):

> [I]n safeguarding the regulation of union membership from Labor Board review Congress did not authorize unions to violate with impunity the protected rights of other parties—particularly of employers, neutrals, and the public.

ployer relationship is impermissibly affected in an adverse manner, through the union's subversion of the undivided loyalty owed by the supervisor to his employer when he is properly acting to further the interests of his employer. The union also improperly affects the union-employer relationship in a meaningful way. Instead of directly dealing with the employer over the managerial "position" which is displeasing to it, the union attempts to force the acceptance of its view upon the employer indirectly, through the imposition of union discipline upon the employer's chosen representative. Such *external* ramifications of the union's actions clearly transcend anything protected by the Supreme Court in either *Allis-Chalmers* or *Scofield*.[38]

Supreme Court decisions issued subsequent to *Allis-Chalmers* have made it expressly clear that the *Allis-Chalmers* rationale only permits "a union * * * to enforce a properly adopted rule which reflects a legitimate union interest [and] *impairs no policy Congress has imbedded in the labor laws* * * *" *Scofield v. N.L.R.B.*, 394 U.S. 423, 430 (1969) (emphasis supplied), *and see* 394 U.S. at 429,

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[38] It is vitally important to remember that sections 8(b)(1)(A) and 8(b)(1)(B) protect different interests. Section 8(b)(1)(A) was only intended to impose some slight controls upon the union-*employee* relationship, and the legislative history makes it clear that Congress did not intend extensive regulation of the *internal* union-*employee*/member relationship. *See N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 183-195 (1967). *See also National Maritime Union*, 78 NLRB 971, 982-987 (1948), *cnfd.*, 175 F.2d 686 (2nd Cir. 1949), *cert. denied*, 338 U.S. 954 (1950). Section 8(b)(1)(B), on the other hand, was clearly intended to regulate the *external* union-*employer* relationship. It is therefore apparent that considerations concerning the right of a labor organization to regulate its *internal* union affairs are not really relevant when the union action in question has meaningful *external* effects upon an employer, in an area wherein the employer is expressly protected under the Act.

432. *See N.L.R.B. v. Marine Workers*, 391 U.S. 418 (1968); *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers v. N.L.R.B.*, —— U.S.App.D.C. ——, ——, 459 F.2d 1143, 1150.[39] Section 8(b)(1)(B) of the Act expresses a clear Congressional policy aimed at affording employers protection against union interference with their chosen representatives. Whenever union action has the effect of impermissibly inhibiting an employer with respect to his choice of loyal representatives, it is apparent that an express federal labor policy is being violated, and it necessarily follows that the rationale underlying *Allis-Chalmers* and *Scofield* cannot be availed upon to nullify the clear section 8(b)(1)(B) violation.[40]

II

Having discussed the general principles which apply to section 8(b)(1)(B) cases such as the instant one, and the applicability of the *Allis-Chalmers* and *Scofield* reasoning to section 8(b)(1)(B) situations, we turn to an evalu-

[39] *See also District 50, Local 12419*, 176 NLRB No. 25, 71 LRRM 1311 (1969); *N.L.R.B. v. International Molders and Allied Workers Union, Local 125*, 442 F.2d 92, 94 (7th Cir. 1971).

[40] Although there may be some persons unfamiliar with the Congressional attitudes which prevailed in 1947 who might believe that it is not appropriate to treat the fining of *supervisor*/members for working during a strike differently from the disciplining of *employee*/members for the same acts, the superficial surface similarity between the two events underlying the union discipline cannot obfuscate the extremely important difference between "supervisors" and "employees" which is recognized by their different treatment under the N.L.R.A. Had the 1947 Congress intended for such persons to be treated alike, it surely would *not* have enacted section 8(b)(1)(B) and the exclusionary portion of section 2(3) relating to supervisory personnel.

ation of the Labor Board's analysis of the particular facts of this case. We first consider the union fines which were imposed upon the supervisor/members who performed rank-and-file work during the economic strike, and secondly consider the disciplinary action which was taken against those supervisor/members who were instrumental in the formation of the Association.

Although the Employer did not *require* his supervisors to report to work during the 1968 strike, the Company made it very clear that it wanted them to perform rank-and-file work in place of the striking employees. However, despite the fact that the Company took action to allow its supervisory personnel to exercise their *own* personal discretion in this matter, Local 134 sought to prevent this by threatening the imposition of discipline on any supervisor/member who decided to further the interests of his Employer by acceding to the request of the Company and performing rank-and-file work during the work stoppage. When Local 134's threats were not sufficient to deter some of the supervisors from honoring the request of their Employer, the union imposed fines of $500 on each.

The Labor Board correctly recognized that Local 134's disciplinary actions taken by Local 134 were a direct result of the fact that those supervisors who reported to work during the strike placed the interests of their Employer above those of their union. It further emphasized the fact that actions of Local 134 "were designed to change the [Company's] representatives from persons representing the viewpoint of management to persons responsive or subservient to [Local 134's] will."[41] The Board concluded that under the reasoning of *Oakland Mailers* and its prog-

[41] *International Brotherhood of Electrical Workers and Local 134, I.B.E.W.*, 192 NLRB No. 17, T.X.D. slip op. at 7, as adopted by N.L.R.B., slip op. at 2, 1971 CCH NLRB ¶23,282 (1971).

eny, such conduct contravened the principles enunciated in section 8(b)(1)(B) of the Act. We agree.

The underlying dispute giving rise to the imposition of the penalties in question was directly between the union and the Company—*not* between the union and the supervisor/members. Local 134 called the strike to encourage a collective bargaining settlement favorable to it. Although the union had the right to insist upon the loyalty of those *employee*/members who were in the bargaining unit covered by the strike,[42] the Company also had the legitimate right under the N.L.R.A. to call upon the undivided loyalty of its representatives.[43] This latter statutory right of the Employer was particularly apropos in the instant case, due to the strike situation.

It is well recognized that "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; *it is part and parcel of the process of collective bargaining.*" *N.L.R.B. v. Insurance Agents International Union*, 361 U.S. 477, 495 (1960) (emphasis supplied). It is readily apparent, therefore, that when supervisors' actions during an economic strike further the interests of their employer, they are performing in a manner which could reasonably be expected from such persons. *See Local Union No. 2150, International Brotherhood of Electrical Workers*, 192 NLRB No. 16, 1971 CCH NLRB ¶ 23,280 (1971). *See also Texas Co. v. N.L.R.B.*, 198 F.2d 540 (9th Cir. 1952). As management

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[42] *See N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180-181 (1967). *See also Booster Lodge No. 405, International Association of Machinists and Aerospace Workers v. N.L.R.B.*, —— U.S.App.D.C. ——, ——, 459 F.2d 1143, 1149-50 (1972).

[43] *See* Part I(A) of this opinion, *supra*.

representatives, supervisory personnel may be requested by management to enhance the bargaining position of their employer during a dispute between it and the particular union involved. Yet this is the precise activity for which the supervisors in question were disciplined by Local 134.[44] Under these circumstances, since they were clearly punished for actions undertaken by them as representatives of their Employer within the meaning of section 8(b)(1)(B),[45] and in accordance with the Employer's express wishes, it logically follows that the disciplining union thereby violated section 8(b)(1)(B) of the Act.

> The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective bargaining agents or to act for it in adjusting grievances.[46]

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[44] There is no question that supervisors enhance the bargaining position of their employer when they perform rank-and-file work during a strike, since their actions reduce the severity of the economic pressure borne by their employer as a result of the work stoppage.

[45] The unions have not challenged the finding of the Labor Board regarding the representative status of the supervisors.

[46] *Local Union No. 2150, International Brotherhood of Electrical Workers*, 192 NLRB No. 16, slip op. at 6-7, 1971 CCH NLRB ¶ 23,280 (1971). *See New Mexico District Council of Carpenters and Joiners of America*, 177 NLRB 500, 502 (1969), *enfd.*, —— F.2d ——, 67 L.C. ¶ 12,403 (10th Cir. 1972); *Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v.*

The two unions argue that the Labor Board erroneously concluded that the Employer was "restrained or coerced," within the meaning of section 8(b)(1)(B), by Local 134's imposition of disciplinary fines, on the theory that the Company did not require its supervisors to perform rank-and-file work during the strike. However, this contention overlooks the fact that the Employer clearly expressed his desire by requesting (without ordering) the supervisors to perform such work in furtherance of the Company's bargaining interests. It also ignores the possible detrimental effects which such disciplinary action might have upon the future relationship between the Employer and its supervisors. It is also contrary to the well settled judicial decisions interpreting the meaning of "restraint or coercion."

"[I]n determining whether a §8(a)(1) or §8(b)(1) violation has been committed, the answer does not 'turn on * * ' whether the coercion succeeded or failed * * * the test is whether the employer [or union] engaged in conduct which, it may be reasonably said, tend[ed] to interfere with the free exercise of [the rights protected] under the Act.' N.L.R.B. v. Illinois Tool Works, 153 F.2d 811, 814 * * *" *Local Union No. 107, Progressive Mine Workers of America v. N.L.R.B.*, 422 F.2d 538, 542 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970). *See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B.*, —— U.S.App. D.C. ——, ——, 458 F.2d 794, 801 n.20. The fact that the Labor Board did not examine the subjective effect upon the Employer of the union discipline with respect to each supervisor does not detract from its conclusion that the disciplinary action was illegal, since the Board reasonably de-

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N.L.R.B., —— U.S.App.D.C. ——, ——, 458 F.2d 794, 798-799 (1972); *N.L.R.B. v. Sheet Metal Workers, Local 49*, 430 F.2d 1348, 1349 (10th Cir. 1970). *See also* Part I(A) of this opinion, *supra*, and cases cited therein.

termined that such action meaningfully detracted from the undivided loyalty owed by the supervisors to their Employer. *See N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969); *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 51 (1954); *N.L.R.B. v. Donnelly Garment Co.*, 330 U.S. 219, 231 (1947). We find substantial evidence in the record considered as a whole to support this Labor conclusion.[47]

B. SUPERVISORS WHO FORMED THE ASSOCIATION

We believe that the Labor Board properly determined that the fining of those supervisors who participated in the formation of the Association constituted a separate section 8(b)(1)(B) violation. The Board resolved this issue in the following manner:

> [T]he Bell Supervisors Protective Association arose out of relations among the supervisors, *the Company*, and the Union, and not * * * out of relations solely between the supervisors and the Union. The Association was formed because the Union threatened to fine supervisors for working during the strike, and to protect or aid those who desired to work. As the Association had its inception as a response to what is here found to be illegal union conduct, it is not unreasonable to extend the finding of illegality to cover the Union's fines relating to the Association. Although the Company was not a party to the creation of the Association, the relationship of the supervisors to the Company underl[ay] the creation of the Association just as it underl[ay] the action of the supervisors in working during the strike. To separate the two sets of fines would be highly legalistic and unrealistic, a practice on which the Board has properly frowned on past occasions, prefering [*sic*] to treat situations "as a whole."[48]

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[47] *See* 29 U.S.C. §§ 160(c) and 160(f) (1970). *See also Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

[48] *International Brotherhood of Electrical Workers and*

"[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. * * * [T]he Board's determination * * * is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). We believe that the Labor Board's treatment of this issue not only comports with the general principles underlying section 8(b)(1)(B),[49] but that it represents the only reasonable manner of resolving the problem. Were the Board to have permitted the union to discipline those supervisors who formed the Association, it would have subverted much of the protective effect provided the Employer by its determination that section 8(b)(1)(B) was violated by the imposition of fines upon those foremen who performed rank-and-file work during the strike. The formation of the Association was part and parcel of the supervisors' efforts to further the bargaining interests of their Employer during the work stoppage. It had its primary genesis in the illegal position of Local 134 regarding the performance of struck work by the Employer's representatives,[50] and, as the Labor Board properly recognized, it would have been wholly irrational

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Local 134, I.B.E.W., 192 NLRB No. 17, T.X.D. slip op. at 10, as adopted by N.L.R.B., slip op. at 2, 1971 CCH NLRB ¶ 23,282 (1971) (emphasis in original).

[49] *See* Parts I(A) and II(A) of this opinion, *supra*.

[50] Although one of the Association's obvious interests concerned the legality of the union-security provision in the Company-Local 134 collective bargaining agreement, it is important to recognize that it was the strike which precipitated the supervisors' concern regarding this issue. It was not until they realized that Local 134 intended to utilize their forced union membership to subvert their loyalty to the Employer that the supervisors undertook to form the

for it to ignore this important causative connection. We therefore affirm this aspect of the N.L.R.B.'s decision.

III

The Labor Board wholly adopted the Trial Examiner's determination that the International Union violated section 8(b)(1)(B) of the N.L.R.A., due to its affirmance, on appeal, of Local 134's disciplinary actions.[51] Since the International Union furthered the coercion and restraint concomitant with Local 134's unlawful conduct (1) by affirming the imposition of the fines despite claims of illegality *specifically raised* by the appealing supervisor/members and (2) by retaining records of these adverse measures which might, in the future, inhibit the performance of supervisory and managerial functions by foremen in accordance with the undivided loyalty owed by them to their Employer,[52] we affirm this Board conclusion.

To rectify the effects of the unfair labor practice, the Labor Board issued the usual cease and desist order, and it affirmatively required *both* unions (1) to rescind the illegally imposed fines and expunge all records pertaining

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Association to protect their position, as well as the interests of their Employer.

[51] *International Brotherhood of Electrical Workers and Local 134, I.B.E.W.*, 192 NLRB No. 17, slip op. at 6-7, 1971 CCH NLRB ¶ 23,282 (1971).

[52] *See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B.*, —— U.S.App.D.C. ——, ——, 458 F.2d 794, 799-800 (1972); *N.L.R.B. v. Toledo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers International Union*, 437 F.2d 55, 57 (6th Cir. 1971); *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union*, 172 NLRB No. 252, slip op. at 2-3, 1968-2 CCH NLRB ¶ 20,195 (1968).

thereto; (2) to provide separate written notices for each disciplined supervisor; and (3) to reimburse the foremen for any fines already paid by them. However, with respect to the individual written notice requirement and the provision concerning the reimbursement of already collected fines, the Board only imposed secondary responsibility upon the International Union, with Local 134 being held primarily responsible.

It is clear that the Board's entire remedial order concerning Local 134 is within the broad remedial discretion which it is granted under section 10(c) of the Act.[13] We also believe that the Labor Board's order is wholly appropriate to the extent that it requires the International Union to cease and desist from its unlawful conduct, to rescind all of the illegal fines and expunge all records pertaining thereto, and to ensure that individual written notices are provided each disciplined foreman.[14] However, we are unable to agree with the Board's imposition of monetary liability upon the International Union for the fines which have already been collected by Local 134.

All of the union disciplinary charges concerning the improperly fined supervisors were brought at the Local 134 level. The disciplinary fines were similarly imposed at the Local 134 level, and only Local 134 has sought to collect them. The International Union's sole action with respect to the fines imposed by Local 134 consisted of its

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[13] 29 U.S.C. § 10(c) (1970). *See Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941); *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540 (1943); *Amalgamated Clothing Workers of America v. N.L.R.B.*, 125 U.S. App.D.C. 275, 281, 371 F.2d 740, 746 (1966); *Office and Professional Employees International Union, Local 425 v. N.L.R.B.*, 136 U.S.App.D.C. 12, 19-20, 419 F.2d 314, 321-322 (1969).

[14] *Id.*

affirmance of them on appeal.[65] Since there is no evidence indicating that the International Union did not exercise good faith when it reviewed Local 134's conduct on appeal, we find that the portion of the Labor Board's remedial order imposing monetary liability on the International Union with respect to the fines already collected by Local 134, was improperly adjudged and cannot be enforced.

The International Union should only be held liable for the illegal fines collected by Local 134, if the local union acted as its agent. "In determining whether any person [was] acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."[66]

> This section [§ 2(13)] was enacted to eliminate the strict requirement for proof of authorization and ratification which the Supreme Court read into a somewhat comparable section of the Norris-LaGuardia Act in United Brotherhood of Carpenters and Joiners of America v. United States, 1947, 330 U.S. 395 * * * But the legislative history of § 2(13) makes plain that *Congress intended to do no more than to restore the applicability of common law agency principles of responsibility* * * *.

International Ladies Garment Workers Union v. N.L.R.B., 99 U.S.App.D.C. 64, 70, 237 F.2d 545, 551 (1956) (emphasis supplied). *See Sheet Metal Workers' International*

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[65] No approval or specific authorization regarding Local 134's illegal disciplinary action was requested from, or given by, the International Union before or during the course of the local union proceedings. Nor did the International Union Constitution or By-laws mandate such unlawful action by local unions.

[66] Section 2(13) of the N.L.R.A., 29 U.S.C. § 152(13) (1970).

Association v. N.L.R.B., 110 U.S.App.D.C. 302, 309, 293 F.2d 141, 148, *cert. denied*, 368 U.S. 896 (1961).[57]

Where the *only action* taken by a national or international union is in the nature of an appellate review of the action of a local union, and the national or international union exercises its appellate function *in good faith and in the absence of fraud*, the national or international union should not be held answerable *in damages* to a member who was wrongfully disciplined by the local union. *See* Annotation, 74 A.L.R.2d 783, 800 (1960); *Schouten v. Alpine*, 215 N.Y. 225, 109 N.E. 244, 246 (1915). *See also Madden v. Atkins*, 4 N.Y. 2d 283, 174 N.Y.S. 2d 633, 151 N.E.2d 73 (1958). Since there is no claim that the International Union in the instant case did not exercise its review function in good faith and in the absence of fraud,[58] we believe that the Labor Board improperly imposed monetary liability upon it.[59] We therefore deny enforce-

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[57] Regarding the relevant legislative history pertaining to section 2(13), *see* H. REP. No. 245, 80th Cong., 1st Sess. 11 (1947), in 1 *Legislative History* at 302; H. CONF. REP. No. 510, 80th Cong., 1st Sess. 36 (1947), in 1 *Legislative History* at 540; 93 CONG. REC. 6442, 6534, and 6859 (1947).

[58] Although the N.L.R.B. argues that the International Union should be held monetarily responsible due to the Board's assertion that the fines imposed by Local 134 were "illegal on their face," we reject this contention. Labor Board and court decisions had not previously defined this extremely difficult area with such exactness that the International Union could reasonably be considered to have affirmed *obviously* unlawful action by Local 134.

We intimate no view concerning the proper liability of a national or international union in a case where it does affirm a local union's disciplinary action on appeal, where it is clear that the local union's action is unlawful *on its face*, preferring to leave the resolution of this issue to a more appropriate occasion.

[59] [The International Union's] only action in the case was

ment to that portion of the Labor Board's remedial order which imposes monetary liability upon the International Union with respect to the illegal disciplinary fines already collected by Local 134, believing that under the particular facts of this case, the imposition of such liability would not meaningfully effectuate the policies of the N.L.R.A.[60] However, in all other respects, the remedial order of the Labor Board is enforced in full.

IV

The Association has challenged that portion of the Labor Board's decision which upheld the Trial Examiner's refusal to permit the Association to amend the complaint on the last day of the unfair labor practice hearings, to include the allegation that the Company-Local 134 union-security agreement was in violation of section 8(a)(3)(i) of the Act.[61] We must reject this contention.

> the exercise of its function to hear the appeal[s] and review the action[s] of the local body. * * * [The International Union] could not be held liable in damages to the [disciplined supervisor/members] because it affirmed [Local 134's actions,] in the absence of fraud or bad faith.

People ex rel. Solomon v. Brotherhood of Painters, Decorators and Paperhangers, 218 N.Y. 115, 112 N.E. 752, 754 (1916).

[60] *See* section 10(c), 29 U.S.C. § 160(c) (1970). The decisions cited by the N.L.R.B. in support of the imposition of monetary responsibility upon the International Union here are not apposite, since they entailed a greater degree of participation by the international unions involved. *See, e.g., N.L.R.B. v. Millwrights, Local 2232*, 277 F.2d 217, 221 (5th Cir. 1960), *cert. denied*, 366 U.S. 903 (1961); *Local 984, International Brotherhood of Teamsters v. Humko Co., Inc.*, 287 F.2d 231, 242 (6th Cir.), *cert. denied*, 366 U.S. 962 (1961).

[61] *See* note 7, *supra*.

In May of 1968, the Association filed an unfair labor practice charge with the appropriate regional office of the N.L.R.B., contending that the union-security provision in the collective bargaining agreement between Local 134 and the Company was illegal under section 8(a)(3)(i) of the Act, since it covered a unit which included both supervisors and rank-and-file employees. The Regional Director refused to issue a complaint relating to the Association's charge, and the General Counsel of the Labor Board upheld that decision on appeal.[62] On June 10, 1969, the instant section 8(b)(1)(B) case was instituted by the Association. However, neither its charge nor the complaint which was issued pursuant thereto, referred in any manner to the legality of the union-security provision. It was not until the afternoon of the fourth and final day of the hearings before Trial Examiner Reel, that the Association raised this issue with respect to the section 8(b)(1)(B) proceedings. It noted that the collective bargaining agreement containing the challenged provision had already been admitted into evidence, and it argued that the Trial Examiner should resolve the question concerning the provision's legality. The counsel for the General Counsel did not join in, or even consent to, the Association's motion to amend the complaint. The Trial Examiner noted the fact that the General Counsel had previously refused to issue a complaint concerning the legal issue raised by the proposed amendment,[63] and he concluded that it would not be appropriate or advisable to permit such a "far

[62] *See* note 8, *supra*.

[63] Although the prior charge filed by the Association had alleged a section 8(a)(3) violation, while the proposed amendment suggested a section 8(b)(2) violation, the two charges were based upon the identical allegation that the Company-Local 134 union-security agreement was in violation of the requirements of section 8(a)(3)(i). *See* note 7, *supra*.

reaching question" to enter the present litigation through the "back door."[64] The Labor Board fully adopted this determination.

In refusing to permit the Association's requested amendment, the Trial Examiner assumed that he possessed the authority under section 10(b) of the Act[65] to permit such an amendment. Without intimating any view concerning the correctness of this assumptive interpretation,[66] we

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[64] *See International Brotherhood of Electrical Workers and Local 134, I.B.E.W.*, 192 NLRB No. 17, T.X.D. slip op. at 13, 1971 CCH NLRB ¶ 23,282 (1971). The Trial Examiner also indicated that such union-shop provisions had been present in similar cases recently before the Labor Board, without any indication by it that such agreements might be violative of the N.L.R.A. *Id.*

[65] 29 U.S.C. § 160(b) (1970) provides *inter alia*: "Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon." The scope of this language, which was part of the original 1935 Wagner Act, may have been limited, however, by the enactment in 1947 of an amendment to the N.L.R.A., which provides that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and *issuance of complaints* under section 160 of this title, and in respect of the prosecution of such complaints before the Board, * * *" Section 3(d), 29 U.S.C. § 153(d) (1970) (emphasis supplied). *See International Union of Electrical, Radio and Machine Workers v. N.L.R.B.*, 110 U.S.App.D.C. 91, 94-95, 289 F.2d 757, 760-761 (1960). *See also* cases cited note 65, *infra.*

[66] *Compare International Union of Electrical, Radio and Machine Workers v. N.L.R.B.*, 110 U.S.App.D.C. 91, 94-95 289 F.2d 757, 760-761 (1960) and *N.L.R.B. v. Raytheon Co.*, 445 F.2d 272, 274 (9th Cir. 1971), *with Frito Co., Western Division v. N.L.R.B.*, 330 F.2d 458, 465 (9th Cir. 1964) and *United Packinghouse, Food and Allied Workers International*

affirm the decision of the Labor Board, because we do not believe that its determination concerning the proposed amendment can reasonably be considered to be an abuse of discretion.[67]

> [The Association's proposed amendment] encompasse[d] charges identical to those [it had previously] filed with the General Counsel; the General Counsel [had] refused to issue a complaint. We would not entertain a frontal attempt to review the General Counsel's decision, Retail Store Employees Union, Local 954 v. Rothman, 112 U.S.App.D.C. 2, 4, 298 F.2d 330, 332 (1962), and have not been convinced to review [it] here, through the back door.

Retail Clerks Union 1059, R.C.I.A. v. N.L.R.B., 121 U.S. App.D.C. 140, 141 n.1, 348 F.2d 369, 370 n.1 (1965). *See International Union of Electrical, Radio and Machine Workers v. N.L.R.B.*, 110 U.S.App.D.C. 91, 94-96, 289 F.2d 757, 760-762 (1960).

This is certainly not a case where the Labor Board has refused to decide a *material* issue which was *fairly tried* by the parties. *See American Boiler Manufacturers Association v. N.L.R.B.*, 366 F.2d 815, 821 (8th Cir. 1966). *See also Frito Co., Western Division v. N.L.R.B.*, 330 F.2d

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Union v. N.L.R.B., 135 U.S.App.D.C. 111, 119 n.12, 416 F.2d 1126, 1134 n.12, *cert. denied*, 396 U.S. 903 (1969).

For the purposes of *this case*, we accept the Labor Board's assumption, due to the fact that we "must judge the propriety of [its] action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947). *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962).

[67] Even the Association concedes that at most, the Board and Trial Examiner were only "under a duty to exercise sound discretion * * *" Brief for the Association at 16.

458, 465 (9th Cir. 1964); *American Boiler Manufacturers Association v. N.L.R.B.*, 404 F.2d 547, 556 (8th Cir. 1968), cert. denied, 393 U.S. 960 (1970). The union-security provision in question was only admitted into evidence as part of the applicable collective bargaining agreement. There was no indication, until the end of the proceedings, that its legality was sought to be in issue. The entire unfair labor practice hearings concerned solely the section 8(b)(1)(B) case. Furthermore, we do not believe that the resolution of the question raised by the Association's proposed amendment to the section 8(b)(1)(B) complaint would have been as straightforward as it now asserts. *Cf. Nassau and Suffolk Contractors Association, Inc.*, 118 NLRB 174, 181 n.23 (1957). Under these circumstances, we are unable to conclude that the Trial Examiner abused any discretion which he might have possessed,[68] and we therefore affirm the refusal of the Labor Board to permit the Association's proffered amendment to the complaint.[69]

The decision of the Labor Board is affirmed in its entirety, and enforcement of its remedial order, *as modified* by this opinion with respect to the monetary responsibility of the International Union concerning the illegal fines already collected by Local 134, is hereby granted.

Judgment accordingly.

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[68] *See* notes 65 and 66, and accompanying text, *supra*.

[69] We, of course, intend to intimate no opinion concerning the legality of a voluntary union-security provision covering a unit which includes both supervisors and rank-and-file employees. Nor do we foreclose the filing of a new charge by the Association challenging the propriety of any presently existing Company-Local 134 union-security agreement.

WRIGHT, *Circuit Judge, concurring in part and dissenting in part*: The opinion of my brethren in the majority is so carefully written and closely reasoned that I hesitate to express any disagreement with it. Indeed, insofar as the majority absolves the International of monetary liability and upholds the trial examiner's decision not to permit any amendment to the complaint, I concur in its judgment. But in this age of "strict constructionism" I simply cannot bring myself to believe that the words of Section 8(b)(1)(B) mean what the majority says they mean.

I am not suggesting that the Taft-Hartley Act need invariably be given a rigid or literal construction. Labor legislation does not always lend itself to the "plain meaning" school of jurisprudence. *Cf. NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 179 (1967). But I am suggesting that it is improper for this court to condone a major shift in federal labor policy when the Labor Board can point to nothing in the words of the statute, nothing in its legislative history, and nothing in the ascertainable congressional purpose to support its action. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965). In my view, the determination whether supervisory personnel who are members of a union need protection from union discipline is one "properly made by Congress." For the moment, at least, Congress has decided not to grant supervisors this protection. *Cf.* 29 U.S.C. § 152(3) (1970); *Carpenters District Council of Milwaukee County* v. *NLRB*, 107 U.S.App.D.C. 55, 57, 274 F.2d 564, 566 (1959). Until Congress changes its mind, I do not believe it proper for the Board to graft such protection onto the Act by twisting the clear meaning of an unrelated provision so as

to serve a purpose which Congress never intended. I must, therefore, dissent from that portion of the majority's opinion and judgment which enforces the Board's Section 8(b)(1)(B) order.

I

Section 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B), provides: "It shall be an unfair labor practice for a labor organization or its agents * * * to restrain or coerce * * * an employer in the selection of his representatives for purposes of collective bargaining or the adjustment of grievances * * *." The purpose of this provision is clear on its face. It is designed to prevent unions from restricting management's free choice of its agent to bargain with the union or adjust grievances. As Senator Taft explained on the Senate floor, "This unfair labor practice * * * is not perhaps of tremendous importance, but employees cannot say to their employer, 'We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.'" 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (hereinafter "Legis. Hist.") 1012 (1948). *See also* Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess., 21, in 1 Legis. Hist. 407, 427; speech of Senator Ellender, 2 Legis. Hist. 1077.[1]

[1] The majority's assertion to the contrary notwithstanding, there is not so much as a word in the legislative history of this or any other section of the Taft-Hartly Act which indicates that § 8(b)(1)(B) was intended to go further and protect supervisors from union discipline. In fact, Congress made quite clear that it had no intention to interfere with the disciplinary activity of unions against members. *See, e.g.*, S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., 20, in 1 Legis. Hist. at 426.

That is the way Section 8(b)(1)(B) was interpreted for over 20 years after its initial enactment,[2] and during this entire period no one so much as suggested that it had any broader application.[3] Then, beginning in 1968, the Labor Board started to erode the original understanding as to the limits of Section 8(b)(1)(B). The process began with the Board's decision in *San Francisco-Oakland Mailers' Union No. 18*, 172 NLRB No. 252 (1968). In *Oakland Mailers*, management charged the union with attempting to discipline a foreman for the manner in which he interpreted the collective bargaining contract. Although there was no allegation that the union was attempting to coerce the employer into hiring a new representative for collective bargaining and adjustment of grievances, the Board nonetheless found a Section 8(b)(1)(B) violation. The union's actions, according to the Board, "were designed to change the [company's] representatives from persons representing the viewpoint of management to persons responsive or subservient to [the union's] will." Slip opinion at 2. This was the sort of pressure which Section 8(b)(1)(B) was designed to prevent. "That [the union] might have sought the substituiton of attitudes rather than persons, and may have exerted its pressure

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[2] *See, e.g., Iron Workers Union* v. *Perko*, 373 U.S. 701, 708 (1963); *Cheney California Lumber Co.* v. *NLRB*, 9 Cir., 319 F.2d 375, 331 (1963); *NLRB* v. *Puerto Rico Rayon Mills, Inc.*, 1 Cir., 293 F.2d 941, 947 (1961); *Local 294, Int. Brhd of Teamsters*, 2 Cir., 284 F.2d 893 (1960); *NLRB* v. *Int. Ladies' Garment Workers Union*, 3 Cir., 274 F.2d 376 (1960); *Brhd of Teamsters & Auto Truck Drivers Local No. 70*, 183 NLRB No. 137 (1970).

[3] Thus until recently it seems to have been assumed that, while management was entitled to insist on nonunion supervisory personnel, a union was free to discipline supervisors who were union members. *See, e.g., Int. Typographical Union Local 38* v. *NLRB*, 1 Cir., 278 F.2d 6, 12 (1960), *affirmed by equally divided Court*, 365 U.S. 705 (1961).

upon the [company] by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [company's] control over its representatives. Realistically, the [company] would have to replace its foremen or face *de facto* nonrepresentation by them." *Id.* at 3.

Standing alone, the *Oakland Mailers* doctrine places a permissible gloss on the statute.[4] Although Section 8(b)(1)(B) speaks literally in terms of coercing the "selection" of employer representatives, it is clear that management's right to a free selection would be hollow indeed if the union could dictate the manner in which the selected representative performed his collective bargaining and grievance settlement duties. But *Oakland Mailers* was not permitted to stand alone. After pausing briefly to consolidate its gains,[5] the Board again moved to expand the contours of the statute. In *Meat Cutters Union Local 81*, 185 NLRB No. 130 (1970), the Board found a Section 8(b)(1)(B) violation when a union attempted to discipline

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[4] Indeed, when a union disciplines a supervisor with the specific intent of forcing management to replace him, the union's conduct falls within the core prohibition of § 8(b)(1)(B). *See, e.g., Dallas Mailers Union, Local 143* v. *NLRB*, 141 U.S.App.D.C. 254, 445 F.2d 730 (1971).

[5] The Board won judicial approval of the *Oakland Mailers* doctrine in *Dallas Mailers Union, Local No. 143* v. *NLRB*, *supra* note 4; *NLRB* v. *Sheet Metal Workers Int. Assn, Local 49*, 10 Cir., 430 F.2d 1343 (1970); and *NLRB* v. *Toledo Locals Nos. 15-P & 272 of Lithographers etc. Union*, 6 Cir., 437 F.2d 55 (1971). The doctrine was applied without essential change in *New Mexico District Council of Carpenters & Joiners and Galen R. Wilson*, 176 NLRB 797 (1969); *New Mexico District Council of Carpenters & Joiners and Marvin Freese*, 177 NLRB 500 (1969); *Houston Typographical Union No. 87*, 182 NLRB 592; and *Freight, Construction, General Drivers, etc. Union, Local 287*, 183 NLRB No. 49 (1970).

a supervisory employee for obeying a company order to institute a new meat procurement policy. *Meat Cutters* differed from *Oakland Mailers* in that no one claimed that the new procurement policy had anything to do with the supervisors' grievance settlement or collective bargaining functions.[6] It was thus unclear how management could claim that even a "substitution of attitudes" as to these functions had occurred. To be sure, a supervisor might be indirectly influenced in his bargaining and grievance settlement duties by union discipline exacted for his conduct in an unrelated area.[7] But this danger exists whenever a union disciplines a supervisor, and the Board had explicitly rejected a *per se* ban on all union discipline of supervisory employees. *See Local Union 453, Brhd of Painters, Decorators & Paperhangers*, 183 NLRB No. 24

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[6] Superficially, *Meat Cutters* might appear similar to *NLRB* v. *Sheet Metal Workers Int. Assn, Local 49, supra* note 5. In *Sheet Metal Workers* the Board found a § 8(b)(1)(B) violation when the union fined a supervisor for performing rank-and-file work ostensibly unrelated to his collective bargaining and grievance adjustment functions, and the 10th Circuit enforced the Board's order. However, a close examination of that case makes clear that the fine was imposed because the supervisor interpreted the union contract in a manner which permitted him to perform the rank-and-file work. *See also NLRB* v. *Toledo Locals Nos. 15-P & 272 of Lithographers etc. Union, supra* note 5. Contract interpretation is, of course, part of a supervisor's grievance settlement duties. In *Meat Cutters* no claim was made that the supervisors were engaged in their grievance settlement functions when they elected to obey the management order to institute a new meat procurement policy.

[7] The case would have been considerably easier if the Board had found that the supervisors were disciplined *with the intent* to influence their collective bargaining and grievance settlement decisions. *Cf. Local Union No. 453, Brhd of Painters, Decorators & Paperhangers*, 183 NLRB No. 24 (1970). But no such finding was made.

(1970). Nonetheless, the Board read into the Act a congressional intent to require the undivided loyalty of supervisors to management in the performance of all their management functions and, on the basis of this reading, found a Section 8(b)(1)(B) violation.

When *Meat Cutters* was appealed to this court, we were clearly concerned that the Board's Section 8(b)(1)(B) decisions might be deteriorating into a flat prohibition against any union discipline of supervisors, thus giving supervisory personnel all the benefits of union membership without having to bear any of the responsibilities. In its *Meat Cutters* brief the Board sought to meet these fears and dispel them. "[I]t is only when the representative's obligations to the union conflict with his management responsibilities that his union obligations are compelled to yield," the Board argued. "Thus, in each case, including the instant case, where the Board has found a Section 8(b)(1)(B) violation based on union discipline of a management representative, the conduct which prompted disciplinary action consisted of the representative's efforts to discharge his management responsibilities. • • • In fact, the Board has recently dismissed a Section 8(b)(1)(B) complaint on the ground that the infraction of union rules for which the employer representative was disciplined did not involve the exercise of supervisory or managerial authority." NLRB brief in *Meat Cutters Union Local 81 v. NLRB*, —— U.S.App.D.C. ——, 458 F.2d 794 (1972), at 15.

Partially on the basis of these representations we enforced the Board's decision, but with the explicit caveat that "[t]he rule here applied by the Board only affects union discipline which is imposed upon a member, who has responsibilities as a representative of his employer in administering the collective bargaining agreement or the adjustment of employee grievances, because he has per-

formed duties as a management representative. * * * The N.L.R.B. has made it clear that a union may legally discipline a supervisor-member for acts which are *not* performed by the individual in furtherance of his obligations as the employer's representative." *Meat Cutters Union Local 81 v. NLRB, supra,* —— U.S.App.D.C. at —— n.12, 448 F.2d at 798-799 n.12. (Emphasis in original.)

After this warning, I would have supposed it would be obvious to the Board that Section 8(b)(1)(B) had already been expanded to its limits. Yet the Board now seeks to expand it once again, this time by reading it in a way which, in the words of the learned trial examiner, "stretch[es] the statute beyond what I would otherwise consider the breaking point." *Int. Brhd of Electrical Workers,* 192 NLRB No. 17 (1971) (trial examiner's decision at 11). Despite the Board's explicit assurance that it would find Section 8(b)(1)(B) violations only when supervisors were fined for "the exercise of supervisory or managerial authority," the Board has here applied the statute to fines levied against supervisors for performance of ordinary rank-and-file work—work which could not possibly be considered to fall within their ordinary managerial responsibilities. This reading of the statute goes beyond *Oakland Mailers,* beyond *Meat Cutters,* and beyond anything which the Board has ever suggested in the past.[8]

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[8] Once before, the Board applied § 8(b)(1)(B) to union fines of supervisors doing rank-and-file struck work. *See Toledo Locals Nos. 15-P & 272 of Lithographers etc. Union,* 175 NLRB 1072 (1969), *enforced,* 6 Cir., 437 F.2d 55 (1971). However, in the *Toledo* case the supervisors were fined for interpreting the contract in a manner which permitted them to perform the work. *See* 437 F.2d at 57. Since contract interpretation is clearly a part of a supervisor's normal grievance settling duties, the *Toledo* case is easily distinguishable. *See* note 6 *supra.*

As the trial examiner pointed out, the previous cases are all

> "readily distinguishable here where the action for which the supervisors were fined bore no direct relation to their work as supervisors or to any interpretation of the contract. As an original proposition I would be inclined to construe Section 8(b)(1)(B) as interdicting union fines of supervisors only when the conduct for which the supervisor was fined bore some relation to his role as a representative of management in 'collective bargaining or the adjustment of grievances,' to quote Section 8(b)(1)(B). In the instant case the question confronting the supervisors whether to work or to respect the strike call of their Union was in no way related to those subjects. Moreover, the Company itself has made it clear that it was not demanding that its supervisors work during the strike. On the contrary, the Company expressly left the decision up to each individual supervisor, with specific assurances that no reprisal would be visited on those who chose not to work. After the strike the Company promoted some of the supervisors who had not worked during the strike. I therefore find some difficulty in concluding that the Company was restrained or coerced by the Union's action in fining the supervisors who worked, or even in finding that the Union's action had any natural or inherent tendency to restrain or coerce the Company. * * *"

192 NLRB No. 17 (trial examiner's decision at 9).[9]

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[9] Although plainly reluctant to find a § 8(b)(1)(B) violation, the trial examiner nevertheless felt compelled to do so because of the Board's prior decision in *New Mexico District Council of Carpenters & Joiners and Galen R. Wilson*, *supra* note 5. A close look at *New Mexico District Council*, however, makes clear that that case is inapposite. The Carpenters & Joiners Union was held to have violated § 8(b)(1)(B) when it disciplined a supervisor who co-signed a letter urging employees to vote with management in a union election. Obviously, it is part of a supervisor's collective bargaining duties to urge management's viewpoint on union members. The board's holding in *New Mexico District*

Like the trial examiner, I also find "some difficulty" so concluding. In fact, as I hope to show in Part II this opinion, the Board's present interpretation of Sect 8(b)(1)(B), in spite of its explicit language, makes it essentially limitless prohibition against any union dis pline of supervisory personnel. Moreover, as Part III show, this expansion of the statute is in the teeth explicit Supreme Court decisions which give it a n rower scope. Finally, as I will argue in Part IV, t Board's reading of the statute finds no support in t policy of the Taft-Hartley Act and cannot be justified reference to the Board's discretion in administering fe eral labor legislation.

II

It seems to be conceded by all parties that, at least theory, Section 8(b)(1)(B) does not absolutely proscri all union discipline of supervisors who are union membe *See* majority opinion at note 28. Indeed, the Board held in *Local Union 453, Brhd. of Painters, Decorators Paperhangers, supra,* and Judge MacKinnon's opinion *Meat Cutters* expressly approved the *Local Union* decision. *See* —— U.S.App.D.C. at ——-—— n.12, F.2d at 798-799 n.12. The Taft-Hartley Act does compel supervisors to become union members, and employer is within his rights if he insists that supervis personnel remain nonunion. But if supervisors are pe mitted to join a union, they receive certain benefits fro their union membership and incur certain concomita obligations. Surely it cannot be doubted, for example, th a union could discipline a supervisor for refusing to p

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Council is therefore squarely within the *Oakland Mall* rule. It is far from obvious, however, that a supervis ordinary duties include performance of rank-and-file wo *See* text at note 10-11 *infra.*

his dues, for deliberately disrupting union meetings, or, to cite an example used by the trial examiner, for refusing to join a union bowling league.

To be sure, as *Oakland Mailers* makes clear, there are also some supervisory activities which Section 8(b)(1)(B) makes immune from union discipline. A supervisor-union member is in the difficult position of simultaneously serving two masters. Any sensible interpretation of the statute must, therefore, involve a determination of what obligations a supervisor owes to his union and what obligations he owes to his employer.

In its opinion today, the majority purports to adhere to these principles. It suggests that a supervisor is immune from union discipline only when he is performing "management functions" and that when he is engaged in "non-management" activity the union is free to impose reasonable fines. Unfortunately, however, the majority nowhere defines precisely what it means by "management functions" and it is clear from the way in which the test is applied that it in fact imposes no limits at all on the reach of Section 8(b)(1)(B).

At the outset, it should be clear that the "management function" test does not mean what this court has taken it to mean in the past. In *Meat Cutters* we upheld the Board's unfair labor practice finding because the supervisors were fined for engaging in usual and traditional management activity. But no one contends that the supervisors in this case were performing functions which supervisors usually or traditionally perform. The record shows that these supervisors were engaged in rank-and-file struck work which, under normal circumstances, was the responsibility of the ordinary employees. Saying that rank-and-file labor is an ordinary management function is like saying that black is white.[10] The two are usually

[10] Thus, as the majority itself concedes, "'Rank-and-file

perceived as diametrical opposites, so that if the one is taken to include the other, the concepts lose all meaning. *Cf. General Tire & Rubber Co.* v. *NLRB*, 1 Cir., 451 F.2d 257, 258-259 (1971).[11]

Perhaps the majority means to suggest that the supervisors are engaged in a "management function" whenever they take action pursuant to a management order. It should be noted, however, that this reading of the statute is at war with the notion that a supervisor undertakes certain duties when he joins a union and that these duties are enforceable by appropriate union sanctions. Suppose, for example, that management orders its supervisors to disrupt a lawful union meeting. Could it seriously be argued that the union must tolerate this disturbance

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work' concerns that work which is ordinarily performed by regular, non-supervisory employees in the bargaining unit." Majority op. at note 4. Inasmuch as the majority also concedes that supervisors can be fined for their nonsupervisory activities, majority op. at note 28, it is difficult to understand the theory under which fines for performance of rank-and-file work are proscribed.

[11] It is interesting that none of the conduct for which these supervisors were punished fell within the description of supervisory functions contained in the Act. Section 2(11) of the Act, 29 U.S.C. § 152(11) provides: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Since these "supervisors" were performing none of these functions at the time when discipline was imposed, but rather were assigned to ordinary rank-and-file work, it could be argued that they were not then supervisors within the meaning of the Act and, hence, were not within the ambit of § 8(b)(1)(B).

without taking disciplinary action because the supervisors were merely "following orders"? If, as argued above, Section 8(b)(1)(B) leaves intact some duties which supervisor-members owe to their unions, then it cannot be that these duties can be abrogated merely because management orders their abrogation. Moreover, even if the management order test were a defensible limiting principle, it would not support the Board's decision in this case. As the majority itself points out, there *was* no management order here requiring supervisors to perform rank-and-file work. On the contrary, management explicitly informed the supervisors that they would not be required to cross the picket line during the strike, and several supervisors who declined to do so were subsequently promoted.

My brethren seek to avoid this embarrassment by suggesting that the proper test is not whether the supervisors acted pursuant to a management order, but rather whether their actions were undertaken *in the interests* of management. It should be apparent, however, that this test fares no better as a limiting principle than the management order test. In fact, to the extent that management and union are viewed as adversaries, it is *always* in management's interests for the supervisors to take actions which weaken the union. For example, it might well be in management's interest for the supervisors to stop paying their union dues, thereby depleting the union's financial resources and limiting its strike capability. Yet all concede that it would be intolerable for supervisors to retain all the benefits of union membership without any enforceable duty to bear some of the financial burdens.

The "management interest" test also fails to justify the actions of the Board concerning the Bell Supervisors Association issue. The Board found that the union committed a Section 8(b)(1)(B) violation when it fined the supervisors for forming the so-called "Bell Supervisors

Protective Association." The Protective Association was formed in part for the purpose of prosecuting an unfair labor practice charge against the company.[12] Thus if one wishes to explain this case in terms of a "management interest" standard, it must be contended that the company had an interest in prosecuting an unfair labor practice against itself!

I submit that there is something inherently wrong with a mode of statutory analysis that yields a product as nonessential as this. This court purports to limit Section 8(b)(1)(B) to union discipline for performance of management activities ordered by management or taken in the interests of management. Yet it then proceeds to apply the provision to a nonmanagement activity not ordered by management and directly contrary to management's interests. I am forced to conclude that the unfair labor practices found in this case are ultimately explicable only if one assumes that all union fines of supervisor-members are unlawful on their face. But that is the one theory which my brethren explicitly disavow and which the statute will not permit.

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[12] On May 21, 1968, the Protective Association filed an unfair labor practice charge, No. 13-CA-8451, alleging that the company's collective bargaining contract was illegal because the union security clause required that supervisory and nonsupervisory personnel be placed in the same collective bargaining unit. The General Counsel refused to prosecute the complaint, citing *Nassau & Suffolk Contractors Assn, Inc.*, 118 NLRB 174, 177-184 (1957). *See* Joint Appendix at 201-202. Subsequently, the Protective Association attempted to amend its § 8(b)(1)(B) complaint so as to include a similar charge against the union. *See* JA at 184-185. The trial examiner refused to permit the amendment, and we uphold that decision today. *See* majority op. at 31-35.

III

The Board's rough sailing through the complexities of Section 8(b)(1)(B) might, perhaps, be more understandable if the seas were entirely uncharted. But in fact union discipline of strikebreakers and other dissidents has been the subject of a series of important Supreme Court decisions which the Board inexplicably chose to ignore. These decisions, unlike the Board's approach, set out a rational, workable interpretation of Section 8(b)(1) which balances the union's right to enforce reasonable discipline against the rights of employers and union members to be free from union overreaching. They should, I think, control the outcome of this case.

The first and most important of these decisions is *NLRB* v. *Allis-Chalmers Manufacturing Co., supra.* In all relevant respects, *Allis-Chalmers* is indistinguishable from this case. There, as here, the union sought to impose reasonable fines on union members who had crossed a picket line during a lawful strike. In *Allis-Chalmers,* however, none of the fined members were supervisors, so the relevant provision governing the union's conduct was subsection (A) of Section 8(b)(1) rather than subsection (B).[13] However, when the Supreme Court found the union innocent of any unfair labor practice, it did so not because of anything in subsection (A), but rather because of its interpretation of the words "restrain or coerce" which are common to subsections (A) and (B). *See* Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy,* 43 N.Y.U. L. Rev. 227, 268 (1968). Thus the Court stated: "It is highly unrealis-

[13] Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), provides, in relevant part: "It shall be an unfair labor practice for a labor organization or its agents * * * to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 157 of this title * * *."

tic to regard § 8(b)(1), *and particularly its words 'restrain or coerce,'* as precisely and unambiguously covering the union conduct involved in this case." 388 U.S. at 179. (Emphasis added.) On the contrary, such a reading of Section 8(b)(1) would "attribute to Congress an intent at war with the understanding of the union-membership relation which has been at the heart of its effort 'to fashion a coherent labor policy' and which has been a predicate underlying action by this Court and the state courts. More importantly, it is to say that Congress limited unions in the powers necessary to the discharge of their role as exclusive statutory bargaining agents by impairing the usefulness of labor's cherished strike weapon." *Id.* at 183.

Of course, *Allis-Chalmers* did not mean that unions were free to impose discipline for any purpose at all. Section 8(b)(1) must be read so as to conform with the other provisions of federal labor law. *See, e.g., NLRB* v. *Int. Ladies' Garment Workers Union*, 3 Cir., 274 F.2d 376 (1960); Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 Geo. Wash. L. Rev. 187, 193-196 (1969). Thus if a union rule "invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1)." *Scofield* v. *NLRB*, 394 U.S. 423, 431 (1969). *See NLRB* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968). But if one thing is clear after *Allis-Chalmers*, it is that there is no "overriding policy of the labor laws" which prohibits reasonable union fines levied against members who cross a lawful picket line to perform rank-and-file struck work. In fact, quite the contrary is true.

> "Integral to [the] federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly

> vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . .' * * *"

NLRB v. Allis-Chalmers Manufacturing Co., supra, 388 U.S. at 181. (Footnotes omitted.)

The majority utilizes two arguments in attempting to distinguish *Allis-Chalmers.* First my brethren contend that the *Allis-Chalmers* Court relied on the proviso in Section 8(b)(1)(A)—a proviso which is not attached to subsection (B) of Section 8(b)(1).[14] I must admit I find it difficult to understand how the majority can maintain this position in light of the *Allis-Chalmers* Court's explicit disclaimer of any reliance on the proviso.[15] As Mr. Justice Black pointed out in dissent: "Since the union resorted to the courts to enforce its fines instead of relying on its own internal sanctions such as expulsion from membership, *the Court correctly assumes the the proviso to § 8 (b) (1)(A) cannot be read to authorize its holding.*" 388 U.S. at 200. (Emphasis added.) Only a few months ago Judge MacKinnon, speaking for a unanimous panel, characterized the holding in *Allis-Chalmers* as follows: "Instead of relying on the express language of the *proviso,* * * * the

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[14] The proviso states: *"Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *."

[15] Thus the *Allis-Chalmers* plurality held: *"It is no answer* that the proviso to § 8(b)(1)(A) preserves to the union the power to expel the offending member," 388 U.S. at 183 (emphasis added), and upheld union fines, not within the scope of the proviso, because "literal application of the imprecise words 'restrain or coerce' * * * [would produce] * * * extraordinary results * * *." *Id.* at 184.

Supreme Court carefully analyzed the entire legislative history of Section 8(b)(1)(A), and it concluded that Congress did not intend to prohibit such internal union discipline by the prohibition against 'restraint' or 'coercion.'" *Booster Lodge No. 405, Int. Assn of Machinists* v. *NLRB*, —— U.S.App.D.C. ——, ——, —— F.2d ——, —— (Nos. 24,687 & 24,774, decided February 3, 1972) (slip opinion at 7-8). In light of this statement, I am frankly amazed to see the proviso argument resurrected at this late date.[16]

Perhaps sensing that substantial reliance on the proviso does little to advance its position, the majority resorts to a second argument. *Allis-Chalmers*, it is argued, dealt only with internal union rules affecting the relationship between a member and the labor organization to which he belongs. Here, however, the union rule had an "effect on parties external to [the union-member] relationship" and therefore falls outside the *Allis-Chalmers* rationale. Majority opinion at 18.

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[16] To support its argument that the proviso makes the Supreme Court's *Allis-Chalmers* decision irrelevant to § 8(b)(1)(B) cases, the majority cites Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of* Allis-Chalmers, 1970 DUKE L. J. 1067, 1128. This is what Professor Gould says at the page cited: "Of course, the existence of the proviso was not critical to the Court's conclusion in *Allis-Chalmers* although it did provide 'cogent support.' In *Allis-Chalmers* the Court was primarily concerned with an assessment of the language 'restrain or coerce'—language which is applicable to section 8(b)(1)(B) as well as section 8(b)(1)(A). Therefore, the mere failure of Congress to attach the proviso to section 8(b)(1)(B) does not establish the conclusion that a union's internal affairs are to be excluded from consideration." Interestingly, Professor Gould ultimately concludes that under *Allis-Chalmers* § 8(b)(1)(B) does permit unions to fine supervisor-members for performance of struck work. *See* 1970 DUKE L. J. at 1128-1129.

This distinction is so subtle that someone in an uncharitable frame of mind might be tempted to characterize it as altogether chimerical. It seems clear, for example, that the union rule in *Allis-Chalmers* had, and was intended to have, an external effect on the employer. By deterring strikebreakers, the rule assured union solidarity and thereby allowed the union to bring greater economic pressure on the company. I simply cannot understand why the anti-strikebreaking rule in *Allis-Chalmers* should be characterized as "internal" while precisely the same sort of anti-strikebreaking rule in this case suddenly becomes "external."

Perhaps there is nonetheless some substance to the internal-external dichotomy, but the distinction, if one exists, was apparently too subtle for the Supreme Court to grasp. In *Scofield* v. *NLRB*, *supra*, the Court unambiguously rejected the internal-external test as a basis for resolving Section 8(b)(1) cases. "It is doubtless true," the Court conceded, "that the union rule in question here affects the interests of all three participants in the labor-management relation: employer, employee, and union. Although the enforcement of the rule is handled as an internal union matter, the rule has and was intended to have an impact beyond the confines of the union organization. But as *Allis-Chalmers* and *Marine Workers* made clear, it does not follow from this that the enforcement of the rule violates § 8(b)(1)(A), unless some impairment of a statutory labor policy can be shown." 394 U.S. at 431-432. (Footnote omitted.) Similarly, I do not see why the external impact of this union rule should affect its validity. The majority ignores the fact that the very purpose of having a union is to affect external relations between employees and their employer. All union rules are therefore "external" since they are all designed to insure a strong and united front among union members when the union confronts its employer adversary. *Allis-*

Chalmers, Scofield and *Marine Workers* stand for the proposition that such rules may nonetheless be enforced "unless some impairment of a statutory labor policy can be shown." And *Allis-Chalmers* makes clear that there is no impairment of "statutory labor policy" when, as here, a union takes reasonable action to insure strike solidarity among its members.

IV

Of course, it is true that *Allis-Chalmers* dealt with fines imposed on ordinary members while here the fines were imposed on supervisors. As argued above, this fact is without relevance to the problem of statutory construction, since the *Allis-Chalmers* Court relied on the general language of Section 8(b)(1) which is applicable to both subsections (A) and (B). Nonetheless, the difference between the two cases might be relevant to the existence of a countervailing "statutory labor policy" which would justify finding a Section 8(b)(1) violation. Specifically, the majority argues that, even if there is no "statutory labor policy" favoring the freedom of union members to perform struck work, there is such a policy which favors insulating supervisory personnel from union discipline.

If this argument is kept within proper bounds, I think it has some validity. Indeed, I think Section 8(b)(1)(B) itself expresses a statutory labor policy which favors allowing supervisory personnel to perform their collective bargaining and grievance settling functions free from union coercion. That, as I understand it, was the holding of *Oakland Mailers*, and I have no quarrel with that decision. But the Board has not kept this argument within proper bounds. Instead, the Board purports to find a broader "statutory labor policy" requiring that the supervisor's absolute duty to his employer always take precedence over any conflicting duty to his union.

With all respect, I think this policy has been manufactured out of whole cloth. While the majority finds it "intuitively obvious" that such a policy exists, majority opinion at 15, it is unable to cite a single court decision, a single provision in the statute, or a single element of the legislative history to support its conclusion.[17] To be sure, Section 2(3) of the Act allows an employer to keep his supervisors out of the union,[18] and a union may even commit an unfair labor practice if it bargains to an impasse over unionization of supervisors. *See International Typographical Union* v. *NLRB*, 1 Cir., 278 F.2d 6 (1960). But here the employer chose not to exercise his option to have nonunion supervisors. The company agreed that supervisory personnel would be union members, and Section 14(a) of the Act makes that agreement legal.[19]

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[17] The majority quotes dicta from *Carpenters District Council of Milwaukee County* v. *NLRB*, 107 U.S.App.D.C. 55, 57, 274 F.2d 551, 566 (1959), to the effect that an employer is free to discharge supervisors to prevent them from joining unions. But no one is claiming that employers have a statutory obligation to allow their supervisors to become union members. Rather, the issue in this case is whether anything in the Act prohibits a union from enforcing reasonable obligations of union membership against supervisors once the employer has decided to allow his supervisory personnel to assume union membership.

[18] Section 2(3), 29 U.S.C. § 152(3) (1970), provides: "The term 'employee' shall include any employee * * * but shall not include any individual employed as * * * a supervisor * * *." Section 7, 29 U.S.C. § 157 (1970), in turn, guarantees to "employees" only the right to form or join labor unions.

[19] Section 14(a), 29 U.S.C. § 164(a) (1970), provides: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

We can be safe in assuming that neither the union nor management agreed to the unionization of supervisors because of an abstract belief in the virtues of trade unionism. The union presumably insisted on this clause in the contract so that it would have some control over the actions of supervisors, and management presumably accepted it because the union gave up something else in return. By enacting Section 14(a) which permits supervisors to join unions, Congress expressly permitted management and labor to reach just such an agreement. *See also* 29 U.S.C. § 158(a)(3)(i) (1970). Yet now management seeks to abrogate its part of the bargain by insisting that supervisors obey management alone. Like the Supreme Court, I can "discern no basis in the statutory labor policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table." *Scofield* v. *NLRB*, *supra*, 394 U.S. at 433.

Nor can I see a basis in federal labor policy for permitting supervisors to retain all the benefits of union membership while incurring none of the costs. As Professor Gould has pointed out:

> "• • • [S]upervisors who remain union members are most often obtaining additional benefits. Frequently, they have remained members in order to retain possession of withdrawal cards which will make it less expensive for them to re-enter the trade or another plant under union jurisdiction. Under the *Allis-Chalmers* rationale, this would seem to indicate a pledge of allegiance by the supervisor and therefore should be deemed consent by such an individual to render himself liable to financial obligations where the union's interest is direct and where the conduct engaged in is somewhat distant from basic supervisory functions. If the employer is unduly harmed by such a rule, it seems to me that its obligation is to make the supervisory position financially attractive enough for the supervisor to forego the benefits of union membership and to resign."

Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of* Allis-Chalmers, 1970 DUKE L. J. 1067, 1129 (1970).

To be sure, the Labor Board is entitled to great deference when it interprets the act it administers. *See, e.g., Brooks* v. *NLRB*, 348 U.S. 96 (1954); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). But this deference has its limits. In the final analysis, "administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the [Board] in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding. Surely an administrative agency is not a law unto itself * * *." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 215 (1947) (Mr. Justice Jackson, dissenting).

In my view, the Labor Board's action in this case was outside the law. I submit that the Section 8(b)(1)(B) requirement that unions not "restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" cannot reasonably be read to prohibit discipline of union members—supervisors though they be—for performance of rank-and-file struck work. I would therefore decline to enforce the Board's order.